(1)

Supreme Court, U.S.
FILED

No. 02-1065 JAN - 9 2003

OFFICE OF THE CLERK

In The

Supreme Court of the United States

STEVE MAY,

Petitioner,

v.

JANICE BREWER, as Secretary of State of the State of Arizona, acting in her official capacity; DAVID PETERSON, as Treasurer of the State of Arizona, acting in his official capacity; the CLEAN ELECTIONS COMMISSION; and ARIZONANS FOR CLEAN ELECTIONS,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Arizona

PETITION FOR A WRIT OF CERTIORARI

INSTITUTE FOR JUSTICE
ARIZONA CHAPTER
CLINT BOLICK*
TIMOTHY D. KELLER
111 W. Monroe Street
Suite 1107
Phoenix, AZ 85022
(602) 324-5440

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
SCOTT G. BULLOCK
1717 Pennsylvania Ave., NW
Suite 200
Washington, D.C. 20006
(202) 955-1300

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

104 pp

QUESTIONS PRESENTED FOR REVIEW

1. May the State permissibly single out a discrete group of individuals to involuntarily bear the financial burden of a public campaign subsidy program?

2. In the area of compelled speech, do this Court's decisions in *Abood*, *Keller*, and *United Foods* create the general rule to which *Southworth* is the exception, or does *Southworth* extend to compelled speech beyond the university setting?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption.

CORPORATE DISCLOSURE

As none of the parties is a corporation, Sup. Ct. R. 29.6 is inapplicable.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
BASIS FOR JURISDICTION	1
CONSTITUTIONAL PROVISION AND STATUTE INVOLVED	1
STATEMENT OF THE CASE	1
A. Statement of Facts	1
B. Statement of the Case	3
REASONS FOR GRANTING THE PETITION	6
I. STATE COURTS OF LAST RESORT HAVE REACHED DIRECTLY CONTRADICTORY DECISIONS REGARDING THE CONSTITUTIONALITY OF INVOLUNTARY POLITICAL SUBSIDIES UNDER THE FIRST AMENDMENT, REQUIRING RESOLUTION BY THIS COURT	7
II. THE COURT BELOW MISAPPLIED THIS COURT'S COMPELLED SPEECH JURISPRUDENCE BY REFUSING TO APPLY *ABOOD*, *KELLER*, AND *UNITED FOODS*, AND BY EXTENDING *SOUTHWORTH* BEYOND THE UNIVERSITY SETTING	12

TABLE OF CONTENTS – Continued

Page

III. THE PROLIFERATION OF PUBLIC FUNDING SCHEMES AND THE INADEQUACY OF VOLUNTARY FUNDING MAKE IT ESSENTIAL TO ESTABLISH CLEAR LEGAL PARAMETERS 19

TABLE OF AUTHORITIES

Page

CASES

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) ..... *passim*

Bates v. Director of Office of Campaign and Political Finance, 763 N.E.2d 6 (Mass. 2002) 8

Bd. of Regents v. Southworth, 529 U.S. 217 (2000) ..... *passim*

Buckley v. Valeo, 424 U.S. 1 (1976) 7, 12

Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214 (1989) 15

Keller v. State Bar of Calif., 496 U.S. 1 (1990) 9, 14, 15, 16, 20

Lavis v. Bayless, slip op., No. CV 2001-006078 (Maricopa County Super. Ct. Dec. 21, 2001) 4

Lavis v. Bayless, slip op., No. CIV 99-1627 PHX PGR TSZ (D. Ariz. Mar. 13, 2001) 4

Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) 14

Libertarian Party of Ind. v. Packard, 741 F.2d 981 (7th Cir. 1984) 12

May v. McNally, 55 P.3d 768 (Ariz. 2002) 1, 5

May v. McNally, 49 P.3d 285 (Ariz. App. 2002) 1, 5

State of Fla. by Butterworth v. Republican Party of Fla., 604 So.2d 477 (Fla. 1992) 9, 10, 15

U.S. v. United Foods, Inc., 533 U.S. 405 (2001) 9, 15, 16

Vt. Society of Ass'n Execs. v. Milne, 779 A.2d 20 (Vt. 2001) 10

W.Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) 6

Wooley v. Maynard, 430 U.S. 705 (1977) 6

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend I ..... *passim*

CODES AND STATUTES

28 U.S.C. § 1257(a) 1

Bipartisan Campaign Finance Act of 2002, 107 P.L. 115; 116 Stat. 81, tit. 3, § 310 20

A.R.S. § 16-940, *et seq.* 1, 2

§ 16-944 3

§ 16-954(A)-(B) 2

§ 16-954(C) 2

Fla. Stats. § 99.092 19

§ 99.093 19

§ 105.031 19

§ 106.04 19

§ 106.07 19

§ 106.29 19

§ 106.32 19

§ 199.052(14) 19

§ 320.02(13) 19

§ 322.08(7)(a) 19

§ 327.25(11) 19

§ 607.1622(1)(a) 19

Ind. Code § 9-18-15-13 19

TABLE OF AUTHORITIES – Continued

Page

Mass. Laws 10 § 42 19

Mass. Laws 62 § 6C 19

Me. Rev. Stats. 21-A § 1020-A(4) 19

§ 1124 19

§ 1125 19

§ 1127 19

Me. Rev. Stats. 36 § 3 19

§ 8 19

Vt. Stats. Ann. Title 11A § 1.22(a)(16) 19

§ 1.22(a)(17) 19

OTHER PUBLICATIONS

Clint Bolick, "Fundraising Arizona: We've Just Seen the Future Of Campaign Finance Reform, and It's Not Pretty," *The Weekly Standard* (Dec. 2, 2002) 18

Center for Responsible Politics, www.opensecrets.org/2000elect/other/presfund/checkoff.htm 8

Ed Hayward, "Voters Go for Change in State Bilingual Ed," *Boston Herald* (Nov. 6, 2002) 8

OPINIONS BELOW

The decision of the Superior Court of Maricopa County, Arizona in *Lavis v. Bayless*, slip op., No. CV 2001-006078 (Maricopa County Super. Ct. Dec. 21, 2001), is unpublished and is set forth at App. 32a. The decision of the Arizona Court of Appeals in *May v. McNally* is published at 49 P.3d 285 (Ariz. App. 2002) and reproduced at App. 16a. The decision of the Arizona Supreme Court in *May v. McNally* is published at 55 P.3d 768 (Ariz. 2002) and reproduced at App. 1a.

BASIS FOR JURISDICTION

The final judgment in this action was entered on October 11, 2002. The basis for this Court's jurisdiction is 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The governing constitutional provision in this matter is the speech clause of the First Amendment to the United States Constitution, which provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech. . . . " The statute at issue is Arizona Revised Statutes (A.R.S.) § 16-940, *et seq.*, which is reprinted in the appendix (App. 39a).

STATEMENT OF THE CASE

A. *Statement of Facts.* In the 1998 general election, the Arizona voters acting by initiative enacted by a narrow

margin Proposition 200, the so-called Clean Elections Act (CEA), A.R.S. § 16-940, *et seq*. (App. 39a), which established a system of public financing for state elections. The act created a system of subsidies for candidates choosing to receive them, and tightened restrictions and reduced the amount of permissible contributions for those who choose to run for state offices without government subsidies.

The Act created the Citizens Clean Elections Commission, which was given extensive authority to regulate state campaigns and contributions. The Commission administers the Clean Elections Fund, which provides public campaign subsidies to those candidates who choose and qualify to receive them. Under the Act, the fund is financed by four funding sources, two voluntary and two involuntary. The voluntary sources are (1) a five-dollar state income tax check-off; and (2) a dollar-for-dollar income tax credit for contributions to the fund up to $ 500 or 20 percent of taxes owed, whichever is greater. See A.R.S. § 16-954(A)-(B). (App. 59a-60a). In 2000, funding from these sources amounted to $1.94 million, or approximately 29 percent of the fund's total revenue.

The remainder of the fund is earmarked from involuntary contributions obtained from two discrete groups of individuals. The first and larger is a "surcharge of ten percent . . . on all civil and criminal fines collected pursuant to section 12.116.01," which includes, *inter alia*, "any civil penalty imposed and collected for a civil traffic violation, . . . a violation of the motor vehicle statutes, . . . or for a violation of the fish and game statutes. . . . " See A.R.S. § 16-954(C). (App. 60a). In other words, a person incurring a parking or speeding ticket would be forced to pay a ten percent surcharge in addition to the amount of the fine to subsidize political campaigns, whether they

chose to or not and whether they support the subsidized candidates or not. In 2000, the surcharges amounted to $ 4.67 million, or 68 percent of the fund's total revenue.

The other involuntary revenue source under the Act is a $100 annual mandatory fee on "all registered lobbyists representing (a) one or more persons in connection with a commercial or for-profit entity except public bodies or (b) a non-profit entity predominately composed of or acting on behalf of a trade association or other grouping of commercial or for-profit entities." A.R.S. § 16-944. (App. 44a). In other words, lobbyists for the Sierra Club or National Right to Life would not have to pay the fee, but lobbyists for the Chamber of Commerce or Farm Bureau would have to pay.

The original plaintiffs in this action were Rick Lavis and Steve May. Lavis is a lobbyist for the Arizona Cotton Growers Association and was forced to pay the $100 lobbyist fee, which was used to subsidize political campaigns against his will. Petitioner May is an Arizona resident who received a parking ticket in 1999 and was fined $ 27, which included a ten percent surcharge for the CEA. He refused to pay the surcharge and has received two notices stating that the amount is still due. At the time May received his fine, he was a member of the state legislature who refused to accept involuntary funds for his campaign. However, the surcharge would have been used to finance the campaigns of candidates that May did not support, including his own opponents.

The 2002 election was the first in which subsidies were available to all candidates for all state elective offices.

B. *Statement of the Case.* A substantially identical lawsuit alleging that the coerced funding provisions of the

CEA violated the First Amendment was filed in federal district court in September 1999. On March 13, 2001, the court dismissed the action for lack of subject matter jurisdiction on the grounds that it challenged a state tax that must be challenged initially in state court. *Lavis v. Bayless*, slip op., No. CIV 99-1627 PHX PGR TSZ (D. Ariz. Mar. 13, 2001).

Lavis and petitioner May filed the instant lawsuit in Maricopa County Superior Court on April 10, 2001, alleging a violation of the First Amendment and the free-speech provisions of the Arizona Constitution. The original defendants, Secretary of State Betsey Bayless, and State Treasurer Carol Springer, filed an answer in which they "take no position regarding the merits of the legal issues raised in this lawsuit" and "request that this Court order such relief as it deems just and proper." Arizonans for Clean Elections, which supports the CEA, intervened as a defendant. The parties stipulated to the facts and filed cross-motions for summary judgment.

On December 21, 2001, the Maricopa County Superior Court issued an opinion striking down the lobbyist fee as an unconstitutional prior restraint on speech under the First Amendment, but upholding the surcharge. *Lavis v. Bayless*, slip op., No. CV 2001-006078 (Maricopa County Super. Ct. Dec. 21, 2001) (App. 32a). In sustaining the surcharge, the court applied *Bd. of Regents v. Southworth*, 529 U.S. 217 (2000), and concluded that the surcharge was permissible because it was viewpoint-neutral. *Id.* at 3-4 (App. 34a-35a).

The plaintiffs appealed the adverse decision on the constitutionality of the surcharge, but the defendants did not appeal the adverse decision striking down the lobbyist

fee.[1] On June 17, 2002, a unanimous panel of the Arizona Court of Appeals reversed and found that the surcharge violated the First Amendment. Applying this Court's line of cases commencing with *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), the court concluded that the trial court had erred in applying *Southworth*, and that the surcharge constituted impermissible compelled speech. *May v. McNally*, 49 P.3d 285 (Ariz. App. 2002) (App. 16a). The court found that "the surcharge is imposed upon a specific group of individuals, placed in a special fund, and geared toward a specific purpose: political campaigns." *Id.* at 291 (App. 27a-28a). The court concluded that the surcharge was unconstitutional "because it is imposed upon a discrete group of individuals who are involuntarily associated and because the supported speech is not germane to the purpose of that association." *Id.* at 292 (App. 31a).

On October 11, 2002, the Arizona Supreme Court reversed. *May v. McNally*, 55 P.3d 768 (App. 1a). The court dispensed with the "germaneness" test dictated by the *Abood* line of cases, *id.* at 772 (App. 10a), and instead applied *Southworth*, concluding that the surcharge was permissible because it was viewpoint-neutral. *Id.* at 773 (App. 10a-11a).

---

[1] Hence, plaintiff Lavis is no longer a party to the proceedings.

REASONS FOR GRANTING THE PETITION

A hallmark of a free society is that participation in election campaigns is voluntary. The State of Arizona has transformed the decision of which political candidates to support with financial contributions – or whether to contribute to a political candidate at all – from an act of individual volition into an act of compulsion. This Court traditionally has served as our nation's ultimate guardian of free political speech, which encompasses "both the right to speak freely and the right to refrain from speaking at all." *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (Murphy, J., concurring); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). This case calls upon the Court to play that essential role again.

As appears below, this case implicates three of the compelling reasons set forth in S. Ct. R. 10(b) and (c) as suggesting appropriate circumstances for review by this Court:

1. A state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort;

2. A state court has decided an important question of federal law that has not been, but should be, settled by this Court; and

3. A state court has decided an important federal question in a way that conflicts with relevant decisions of this Court.

I. STATE COURTS OF LAST RESORT HAVE REACHED DIRECTLY CONTRADICTORY DECISIONS REGARDING THE CONSTITUTIONALITY OF INVOLUNTARY POLITICAL SUBSIDIES UNDER THE FIRST AMENDMENT, REQUIRING RESOLUTION BY THIS COURT.

In *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976), the Court recognized that government has an interest in facilitating "public discussion and participation in the electoral process, goals vital to a self-governing people," which may be accomplished through the public funding of campaigns. The Court upheld against First Amendment challenge an income tax checkoff that allows federal taxpayers voluntarily to designate a portion of their tax liability for use in a presidential campaign fund, finding that the fund "is like any other appropriation from the general revenue" except that its amount is determined by the number of voluntary check-offs. *Id.* at 91. The Court noted that every congressional appropriation "uses public money in a manner to which some taxpayers object." *Id.* at 92. However, the Court did not in that case, nor in subsequent decisions, have occasion to address the important question presented by this case: whether government permissibly may impose the financial burden of political campaigns on discrete groups of individuals, not by voluntary means but through compulsion. The courts below divided sharply on that question, as have the courts of the various other jurisdictions to have considered it, presenting a classic case requiring resolution by this Court.

In devising Arizona's campaign subsidy program, the drafters of Proposition 200 opted against funding the program exclusively through the two means for which this Court in *Buckley* apparently created a constitutional safe

harbor: general appropriations or voluntary income tax check-offs. They did so with the obvious recognition that while the idea of campaign subsidies seems politically popular, the reality of paying for them through taxpayer dollars is not. Given competing fiscal priorities, legislatures and taxpayers appear to assign a very low priority to funding politicians.[2] However, by singling out two discrete and unpopular classes of individuals – lobbyists for for-profit causes and individuals sustaining civil or criminal fines – to involuntarily bear most of the expense of campaign subsidies, the initiative's proponents triggered scrutiny under this Court's compelled speech jurisprudence.

On at least four occasions so far, states have opted to fund campaign subsidy programs not exclusively through general appropriations or voluntary check-offs, but in part through involuntary assessments imposed on discrete groups of individuals. The appellate courts of last resort

---

[2] In 2000, funds derived in Arizona from the dollar-for-dollar income tax credit, which costs taxpayers who take it nothing, and the five-dollar income tax check-off, which actually returns five dollars to the taxpayer who opts for it, comprised less than 30 percent of the Clean Elections Fund in Arizona. Likewise, at the federal level, only about 12 percent of taxpayers designate three dollars of their taxes to the presidential campaign fund. Center for Responsible Politics, www.opensecrets.org/2000elect/other/presfund/checkoff.htm (visited Dec. 2, 2002). In Massachusetts, state courts had to force recalcitrant state officials to appropriate funds for its campaign subsidy program. *Bates v. Director of Office of Campaign and Political Finance*, 763 N.E.2d 6 (Mass. 2002). Subsequently in 2002, approximately 75 percent of the Massachusetts electorate voted in a nonbinding state-wide referendum to oppose the use of taxpayer funds for campaign subsidies. Ed Hayward, "Voters Go for Change in State Bilingual Ed," *Boston Herald* (Nov. 6, 2002), at 4.

have split over their constitutionality, with two upholding the schemes and two striking them down.

The courts below illustrate the confusion and difficulty inherent in applying this Court's rules on compelled political speech in the context of involuntary campaign subsidies. The trial court struck down the annual fee imposed upon certain lobbyists, but upheld the surcharge on civil and criminal fines (App. 35a, 37a). The court of appeals unanimously struck down the surcharge (App. 31a). The Arizona Supreme Court unanimously upheld it (App. 15a). In so doing, the court distinguished this Court's compelled speech jurisprudence developed in such cases as *Abood, supra; Keller v. State Bar of Calif.*, 496 U.S. 1 (1990); and *U.S. v. United Foods, Inc.*, 533 U.S. 405 (2001) (see App. 6a-8a); and concluded that "[w]e find the *Southworth* approach better suited than the *Abood* line of cases for analyzing the constitutionality of the Clean Elections Act." (App. 10a). Applying *Southworth*, the court found the compelled subsidies constitutional because, in its view, the program is viewpoint-neutral. (App. 11a-12a).

In stark and direct contrast, the Florida Supreme Court struck down under the First Amendment a law that imposed a 1.5 percent assessment on all contributions received by political parties, which was earmarked for the state's political subsidy fund. *State of Fla. by Butterworth v. Republican Party of Fla.*, 604 So.2d 477 (Fla. 1992). The court found that "[s]upport from the trust fund is available on a content-neutral basis, but at least a portion of that money will be given to the appellees' adversaries, and in those cases the effect of the assessment will be to subsidize political candidates with political positions differing from those of the appellees." *Id.* at 479. Applying the "germaneness" test of *Abood* and its progeny, the court concluded

that "singling out political parties and associations to support the fund bears no relationship to the interest advanced." *Id.* at 480. The holdings of the Arizona Supreme Court in this case and the Florida Supreme Court in *Butterworth* cannot be reconciled.[3]

Two other cases also reflect conflict in this area. In *Vt. Society of Ass'n Execs. v. Milne*, 779 A.2d 20 (Vt. 2001), the Vermont Supreme Court invalidated a tax imposed upon lobbyists to fund campaign subsidies. The court noted that lobbyists "were specifically targeted in an effort to redirect [funds] . . . to a neutral public fund for candidates for the offices of governor and lieutenant governor." *Id.* at 28. The court rejected the defense of viewpoint neutrality, noting that this Court "has never upheld a tax that singled out First Amendment interests, irrespective of whether it suppressed particular viewpoints." *Id.*

[3] The court below attempts to distinguish *Butterworth* by noting that the statute "directly burdened political contributions." (App. 12a n.5). While that fact is true, the actual financial burden was borne by the political parties, not the contributors; and the gravamen of the court's decision was that political parties were singled out to make contributions to a political fund whose purpose was not germane to the purpose of the association – precisely as *Abood* requires (see Part II, *infra*).

CONFLICTING DECISIONS ON COERCED POLITICAL SUBSIDIES

	State of Fla. by Butterworth v. Republican Party of Fla.	*May v. McNally*
Court	Florida Supreme Court	Arizona Supreme Court
Involuntary Fee	Assessment on Contributions	Surcharge on Civil & Criminal Fines
Viewpoint Neutral?	Yes	Yes
Applicable Precedent	*Abood*	*Southworth*
Constitutional Standard	Strict Scrutiny, Germaneness	Viewpoint Neutrality
Application of Standard	Viewpoint neutrality insufficient; assessment is compelled political speech and not germane to association's interests	"[V]iewpoint neutrality in in the allocation of funds adequately safeguards First Amendment rights" (App. 10a)
Result	**Unconstitutional**	**Constitutional**

In *Libertarian Party of Ind. v. Packard*, 741 F.2d 981 (7th Cir. 1984), the Seventh Circuit upheld the use of funds derived from the sale of personalized license plates to subsidize political parties. The court applied *Abood*, noting that "the right not to contribute to the spreading of a political message is protected by the first amendment." *Id.* at 988. However, the court found that the *Abood* standard was not violated because the funds were not used to support a particular partisan viewpoint. *Id.* at 989. But the court also emphasized that this statute involved no compulsion; as with the voluntary tax check-offs in *Buckley*, "each member of the public can control the amount of money distributed to qualifying political parties through his or her decision to buy or refrain from buying a personalized license plate." *Id.* at 990. It is not clear from this case whether the Seventh Circuit requires viewpoint neutrality, voluntariness, or both.

Plainly, this is an area in need of doctrinal clarity: at present, whether individuals may be forced to contribute to political campaigns depends upon the jurisdiction in which they find themselves. Such an act of governmental compulsion, which touches upon the most intimate political decisions one can make in a democratic society, should not remain long an open question.

II. THE COURT BELOW MISAPPLIED THIS COURT'S COMPELLED SPEECH JURISPRUDENCE BY REFUSING TO APPLY *ABOOD*, *KELLER*, AND *UNITED FOODS*, AND BY EXTENDING *SOUTHWORTH* BEYOND THE UNIVERSITY SETTING.

As the divergent decisions of the Arizona and Florida Supreme Courts and the courts below illustrate, the choice of

which of this Court's compelled speech decisions to apply – *Abood* and its progeny or *Southworth* – tends to determine the outcome in a case challenging involuntary campaign subsidies. That is because *Southworth*, in the limited setting of a university, dispenses with the "germaneness" test that is central to the *Abood* line of cases. If an involuntary campaign subsidy is imposed upon a class of individuals who have no direct relationship to the electoral process, by definition the classification cannot satisfy the germaneness standard. Hence, a court may only hold such a subsidy permissible if it extends *Southworth* beyond the university setting, in apparent direct contradiction to this Court's intentions.

That is exactly the jurisprudential innovation the court below marked when it applied *Southworth* to the involuntary campaign subsidies at issue here. In that determination, the Arizona Supreme Court stands apparently alone: our research reveals not a single other reported appellate decision that has applied *Southworth* outside of the university setting, for the obvious reason that this Court made clear that its holding was unique to that setting. Only this Court can correct that error.

This Court's modern compelled speech jurisprudence began in 1977 with *Abood*, when the Court unanimously ruled that a public teachers union could not force teachers to fund political and other ideological activities of which they did not approve. The Court's decision was not grounded in the objection by those forced to pay union dues to a particular message, as the court below asserted, but rather in the fact that the union engaged in political activities beyond those related to the collective bargaining agreement. Because the "state law 'sanctions the use of nonunion members' fees for purposes other than collective

bargaining'," the Court ruled, "this case presents constitutional issues." *Id.*, 431 U.S. at 232 (citation omitted). As the Court declared, "The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights." *Id.* at 234. As a consequence, the Court established a bright-line rule: the union could only "constitutionally spend funds for the expression of political views, *on behalf of political candidates*, or toward the advancement of other ideological causes not germane to its duties as a collective-bargaining representative" only through "charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will. . . . " *Id.* at 235-36 (emphasis added).[4]

The Court subsequently applied the principles of *Abood* to the context of the integrated bar in the 1991 *Keller* decision, again by a unanimous Court. The Court distinguished between "appropriations made to [the bar] by the legislature," in which the government is acting as "'representative of the people,'" as opposed to funds derived "from dues levied on its members," specifically all California lawyers, who are required to be members of the bar. *Id.*, 496 U.S. at 10-11 (citation omitted). As the Court noted, the bar "was created, not to participate in the general

[4] Forbidden uses of compelled contributions included not only political contributions, but also lobbying or other union political activities outside the limited context of contract ratification or implementation, programs designed to secure funds for public education, litigation unrelated to the bargaining unit, and even public relations efforts designed to enhance the reputation of the teaching profession. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991).

government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession." *Id.* at 13. Applying the germaneness test, the Court concluded that the state bar "may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity." *Id.* at 14.

The same test should apply here. As this Court has held, "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (citation omitted). As the Florida Supreme Court observed in *Butterworth*, 604 So.2d at 479, "It is well established that supporting a political candidate financially is speech and represents political expression at the core of the electoral process." Were a court properly to apply the principles of *Abood* and *Keller* to the context of compelled political subsidies, as did the court of appeals below, it necessarily would find them unconstitutional. Those who are unfortunate enough to have civil or criminal fines assessed against them have no special connection to the political process. Fees related to the administration of justice might properly be assessed against them, but not political subsidies. If the germaneness test applies, the subsidies at issue here are impermissible.

Only two years ago, the Court amplified further its compelled speech principles in *United Foods*, and extended the *Abood* framework outside the context of political speech, invalidating assessments imposed upon mushroom handlers to promote mushroom sales. The Court described

the issue in terms strikingly similar to the instant case: "The question is whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced." *United Foods*, 533 U.S. at 410. The Court reiterated that the First Amendment forbids government from compelling individuals to express certain views *and* "from compelling certain individuals to pay subsidies for speech to which they object." *Id.* But the Court also emphasized that "[b]efore addressing whether a conflict with freedom of belief exists, a threshold inquiry must be whether there is some state imposed obligation which makes group membership less than voluntary; for *it is only the overriding associational purpose which allows any compelled speech in the first place*." *Id.* at 413 (emphasis added). Construing *Keller* in terms markedly different than the court below, the Court declared that "[t]he central holding of *Keller*" was not that individual members could not be forced to subsidize beliefs with which they disagreed, but "that the objecting members were not required to give speech subsidies for matters not germane to the larger regulatory purpose which justified the required association." *Id.* at 414. As if speaking to the present case, the Court affirmed that "[w]e have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself." *Id.* at 415. The Clean Elections Act, whose "principal object is speech itself," imposes the costs of political subsidies upon a class of individuals who are not voluntarily associated, for purposes completely unrelated to the class. Plainly, the Clean Elections Act cannot survive the test of *United Foods*.

The court below declined to apply this Court's broad compelled speech framework, instead opting to apply

Southworth, ignoring that this Court made clear that its decision upholding the mandatory use of student fees was unique to the university context, where association is of course voluntary and whose broad mission, among other things, is "'to discover and disseminate knowledge'." *Id.*, 529 U.S. at 221 (quoting university's mission). The Court observed that student organizations were prohibited from using mandatory fees for "politically partisan" activities or for organizations that have a "primarily political orientation." *Id.* at 225-26. Moreover, the fee was not imposed upon a distinct group of students, but upon the community as a whole in an act of self-governance. "The University's whole justification for fostering the challenged expression is that it springs from the initiative of the students, who alone give it purpose and content in the course of their extracurricular endeavors." *Id.* at 229. Here too the compelled subsidies spring from the initiative of the community, but with a very different effect: the fees are imposed not by the community upon itself, but by the community upon a discrete subset. It would not strain the imagination to envision a very different result in *Southworth* had the fees not been imposed upon the entire community, but only upon the College Democrats or the glee club.

The Court concluded in *Southworth* that the "standard of germane speech as applied to student speech *at a university* is unworkable. . . . It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning." *Id.* at 231-32 (emphasis added). The court below did not explain why the germaneness test, to which this Court has adhered in every other context, cannot apply here. Indeed, it would seem easier to apply the rule here than in the union or bar contexts, for there is not even the remotest argument that the speech

here is germane to an association purpose (or even that there is an association purpose). If the precious constitutional protection against compelled political speech is to be eroded through the extension of a narrow exception, that rule should be announced not by a state supreme court but by this Court. Certainly a decision by a state supreme court doing just that necessitates review.

Even if *Southworth* provided the applicable rule, the compelled speech here is not viewpoint-neutral, notwithstanding that all candidates may qualify for subsidies. First of all, the act of contributing to campaigns *at all* is an expression of political speech. An individual may choose not to vote, to contribute, or to participate in the political process at all, which is a distinguishing characteristic of a free society and surely protected by the First Amendment. Yet that decision has been removed from members of the subject class in Arizona by virtue of the Clean Elections Act.

Moreover, the only candidates who are funded by the CEA are those who do not object philosophically to political subsidies generated from taxpayer or involuntary contributions. Hence the subsidies are not viewpoint-neutral, and those like petitioner May who are singled out to bear the financial burden may be asked to support candidates with whom they disagree. The recent election for governor pitted one candidate who ran with subsidies and another who was philosophically opposed to them. See Clint Bolick, "Fundraising Arizona: We've Just Seen the Future of Campaign Finance Reform, and It's Not Pretty," *The Weekly Standard* (Dec. 2, 2002), at 23. May's coerced contribution would be funneled to one candidate but not the other.

Forced political participation in Arizona, occasioned by the challenged funding sources, is a chilling departure from the principles of a free society and has enormous free-speech implications that this Court should address. Specifically, it should assure that the compelled speech framework that it has steadfastly applied over the past two decades – and that so far has admitted only one narrow exception – should not be eviscerated.

III. THE PROLIFERATION OF PUBLIC FUNDING SCHEMES AND THE INADEQUACY OF VOLUNTARY FUNDING MAKE IT ESSENTIAL TO ESTABLISH CLEAR LEGAL PARAMETERS.

At least six states so far have adopted public subsidies for election campaigns. The sources of funding vary. Florida derives funds from candidate filing fees and voluntary contributions. See Fla. Stats. §§ 106.32, 99.092, 99.093, 105.031, 106.04, 106.07, 106.29, 199.052(14), 320.02(13), 322.08(7)(a), 327.25(11), and 607.1622(1)(h). Indiana obtains funds from personalized license plate sales. Ind. Code § 9-18-15-13. Maine collects funds from voluntary donations, tax checkoffs, and fines, along with general tax revenues. Me. Rev. Stats. 21-A §§ 1020-A(4) 1124, 1125, 1127 and 36 §§ 3 and 8. Massachusetts provides general appropriations, a tax checkoff, and fines. Mass. Laws 10 § 42 and 62 § 6C. Vermont no longer may use lobbyist fees, so relies primarily on funds derived from annual report fees by domestic corporations. Vt. Stats. Ann. Title 11A §§ 1.22(a)(16) and (17). Some of those sources are general appropriations or voluntary contributions; others are involuntary assessments imposed upon discrete groups of individuals. But the rules governing

them, especially in light of the Arizona Supreme Court's decision in this case, are far from settled.

Moreover, the recently enacted McCain-Feingold federal campaign finance law provides for a study of the public funding systems in Arizona and Maine. Bipartisan Campaign Finance Act of 2002, 107 P.L. 115; 116 Stat. 81, tit. 3, § 310. The impetus for public campaign subsidies is strong. No matter how well-intentioned, efforts to expand political speech through campaign subsidies should not as a byproduct infringe the free-speech rights of dissenters. Given the proliferation of such schemes, the divergence in legal standards applied by lower courts, and the clear challenge to this Court's compelled speech jurisprudence, this Court should review the decision below and set forth clear constitutional parameters.

Thomas Jefferson declared that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." Quoted in *Keller*, 496 U.S. at 10. In a free society, political participation must be voluntary. We urge this honorable Court to reaffirm that vital principle.

Respectfully submitted,

INSTITUTE FOR JUSTICE
ARIZONA CHAPTER
CLINT BOLICK*
TIMOTHY D. KELLER
111 W. Monroe Street
Suite 1107
Phoenix, AZ 85022
(602) 324-5440

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
SCOTT G. BULLOCK
1717 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006
(202) 955-1300

**Counsel of Record*

SUPREME COURT OF ARIZONA
En Banc

STEVE MAY, Petitioner, v. HON. COLLEEN A. McNALLY, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa, Respondent Judge, BETSEY BAYLESS, as Secretary of the State of Arizona, acting in her official capacity; CAROL SPRINGER, as Treasurer of the State of Arizona, acting in her official capacity; and the CITIZENS CLEAN ELECTIONS COMMISSION; and ARIZONANS FOR CLEAN ELECTIONS, Real Parties in Interest.	Arizona Supreme Court No. CV-02-0215-PR Court of Appeals Division One No. 1 CA-SA 02-0073 Maricopa County Superior Court No. CV 2001-006078 **OPINION** (Filed Oct. 11, 2002)

Special Action from the Superior Court of Maricopa
County The Honorable Colleen A. McNally, Judge
JUDGMENT AFFIRMED

Court of Appeals, Division One
203 Ariz. 13, 49 P.3d 285 (App. 2002)
OPINION VACATED

INSTITUTE FOR JUSTICE ARIZONA CHAPTER — Phoenix
by Clint Bolick
and Timothy D. Keller
Thomas P. Liddy
Attorneys for Petitioner

THOMAS P. PROSE, Acting Arizona Attorney General in this case and Chief Assistant Attorney General — Phoenix
by Kathleen P. Sweeney, Assistant Attorney General
and Todd F. Lang, Assistant Attorney General
Attorneys for Real Party in Interest
Citizens Clean Elections Commission

ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST — Phoenix
by Timothy M. Hogan
and

THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW — New York, NY
by Elizabeth Daniel
Attorneys for Real Party in Interest
Arizonans for Clean Elections

PACIFIC LEGAL FOUNDATION — Sacramento, CA
by Deborah J. La Fetra
Attorneys for Amicus Curiae Pacific Legal Foundation

BERCH, Justice.

¶1 In the 1998 general election, Arizona voters approved the Citizens Clean Elections Act to "encourage citizen participation in the political process, and . . . promote

freedom of speech under the U.S. and Arizona Constitutions," and to "create a clean elections system that will improve the integrity of Arizona state government by diminishing the influence of special-interest money." Ariz.Rev.Stat. ("A.R.S.") § 16-940(A) (Supp.2001). The Act provides public financing for the campaigns of qualifying candidates for certain elected offices. *See id.* §§ 16-940 to -961 (Supp.2001). This case presents a challenge to the Act's key funding provision.

¶2 The Act created the Citizens Clean Election Commission ("CCEC"), which oversees the disbursement of funds to qualifying candidates. To fund the campaigns of "clean elections" candidates, the CCEC collects funds from four sources: voluntary contributions to the fund, funds earmarked through a "check-off" provision on state income tax returns, a fee on certain registered lobbyists, and a ten percent surcharge on civil and criminal fines. *Id.* §§ 16-944, 16-954(A)-(C). We are asked to determine whether the ten percent surcharge on criminal and civil fines required by A.R.S. § 16-954(C) violates the First Amendment by impermissibly compelling those who pay the fines to support the speech of political candidates whom they might not otherwise support. We hold that it does not.

BACKGROUND

¶3 Petitioner Steve May, then an Arizona state legislator, received a parking ticket and was fined $27, on which a ten percent surcharge authorized by the Act was assessed. May refused to pay the $2.70 surcharge, claiming that doing so would violate his First Amendment right to free speech because the money might be used to fund

the campaigns of candidates whose views he opposed. He also challenged the fee on registered lobbyists.

¶4 May filed a federal court action, which was dismissed on the ground that the Tax Injunction Act, 28 U.S.C. § 1341, deprived the court of subject matter jurisdiction. *See Lavis v. Bayless,* No. CIV 99-1627 (D.Ariz. Mar. 13, 2001). He then filed his action in Maricopa County Superior Court, urging the state courts to find the Act unconstitutional. The Citizens Clean Elections Commission and Arizonans for Clean Elections, the group that sponsored the initiative, intervened in support of the Act's constitutionality. The trial court upheld the constitutionality of the surcharge on civil and criminal fines, but invalidated the fee assessed against certain registered lobbyists. *May v. Bayless,* No. CV 2001-006078 (Mar. Cnty. Super. Ct. Apr. 2, 2002). The latter ruling was not appealed.

¶5 The court of appeals reversed, finding the surcharge an unconstitutional restraint on free speech and enjoining the State from imposing it. *May v. McNally,* 203 Ariz. 13, 49 P.3d 285 (App.2002).

¶6 We stayed the court of appeals opinion and granted review to determine whether the surcharge provision of the Clean Elections Act impermissibly compels political speech of the surcharge payers, in violation of the First Amendment's guarantee of freedom of speech.

DISCUSSION

¶7 Our analysis is framed by the United States Supreme Court's opinion in *Buckley v. Valeo,* 424 U.S. 1, 92-93 (1976), which recognized that government may

properly use public funds to establish a system of campaign financing.[1] In *Buckley,* the Court considered, among other issues, the constitutionality of the Presidential Election Campaign Fund, a provision of the Federal Election Campaign Act of 1971 that allowed taxpayers a one dollar check-off on income tax returns that resulted in a dollar-for-dollar allocation out of the general fund to qualifying presidential candidates. *Id.* at 86-87.

¶8 Those opposing the Presidential Campaign Fund argued that they should be allowed to designate the candidate to whom their dollar contribution would go. But the Court disagreed, noting that the campaign fund "is like any other appropriation from the general revenue except that its amount is determined [by the number of check-offs]." *Id.* at 91. The fact that the contributions stemmed from a voluntary check-off "does not constitute the appropriation any less an appropriation by Congress." *Id.* Rather, the "check-off is simply the means by which Congress determines the amount of its appropriation." *Id.* at 91 n.124. The Court was not moved by the taxpayers' objection to the potential use of the funds for candidates the taxpayers opposed. It noted that every congressional appropriation "uses public money in a manner to which some taxpayers object." *Id.* at 92.

¶9 The Court determined that the check-off provision of the Presidential Campaign Fund did not implicate the First Amendment because the provision was designed

---

[1] *Accord Little v. Florida Dep't of State,* 19 F.3d 4, 5 (11th Cir. 1994) (holding that financing campaigns with public funds does not violate First Amendment); *Libertarian Party v. Packard,* 741 F.2d 981, 989-90 (7th Cir. 1984) (same).

to use public money "not to abridge, restrict, or censor speech, but rather . . . to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93. Accordingly, the Court concluded, public funding of presidential campaigns "furthers, not abridges, pertinent First Amendment values." *Id.* at 93.

¶10 *Buckley* thus affirms the proposition that the public financing of political candidates, in and of itself, does not violate the First Amendment, even though the funding may be used to further speech to which the contributor objects.[2]

¶11 May nonetheless maintains that, despite *Buckley*'s general approval of public financing of political campaigns, three cases decided by the Court after *Buckley* compel a different result in the case before us. Those cases – *Abood, Keller,* and *United Foods* – hold that discrete groups of individuals cannot be compelled to fund speech that they find objectionable unless that speech is germane to the group's purpose. May urges that the *Abood* line of cases should guide our inquiry.

¶12 In *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), non-union schoolteachers were required to pay a service charge to the teachers' union. The union used the money for several purposes, including funding

---

[2] Indeed, *Buckley* suggests that Congress could have funded the Federal Election Campaign Act out of the general revenue regardless of whether the funding system included the voluntary check-off provision, *see* 424 U.S. at 91-92, and May concedes that if the money had gone into the general fund and could not be traced to any individual, there would be no constitutional problem.

political and ideological activities that some non-union teachers found objectionable. *Id.* at 212-13. The Court held that unions could spend union dues to support political candidates and causes, but could use only "such expenditures . . . from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Id.* at 235-36.

¶13 Similarly, in *Keller v. State Bar of California,* 496 U.S. 1 (1990), California lawyers were required to join the state bar association and pay dues as a condition of practicing law in the state. As it had in *Abood,* the Court held that an organization such as a bar association, in which membership is a condition of employment, may use funds generated from mandatory membership fees for activities "germane" to the organization, but it could not use those funds to advocate or support ideological viewpoints "not 'germane' to the purpose for which compelled association was justified." *Id.* at 13.

¶14 Finally, in *United States v. United Foods, Inc.,* 533 U.S. 405 (2001), the Court invalidated fees charged to mushroom handlers to fund advertisements promoting mushroom sales because the speech was not germane to a larger regulatory purpose of the association.

¶15 The *Abood* line of cases instructs that government may not condition involuntarily associated individuals' opportunity to receive a benefit or ply their trade or profession upon their compelled support of speech with which they disagree. We note, however, that no benefit is being conditioned upon the payment of the surcharge at issue here, nor is payment of the surcharge a precondition to employment. The opportunity to commit a crime or park

illegally is not deserving of the same protection as is the opportunity to participate in lawful activity contemplated by the Supreme Court in the *Abood* line of cases.

¶16 Importantly, the "germaneness test" derived from the *Abood* line of cases is predicated upon the existence of an association. An association is a "gathering of people for a common purpose; the persons so joined." BLACK'S LAW DICTIONARY 119 (7th ed.1999). In this case, the surcharge payers have not joined together for a common purpose. At best, the group consists of tens of thousands of otherwise unrelated individuals who, at one time or another, paid a civil or criminal fine. Indeed, May conceded at oral argument and in his brief that "there is no association." This stands in sharp contrast to the associations in *Abood, Keller,* and *United Foods,* whose members were linked by a common purpose. The Act, then, does not create an association of fine payers, and without an association by which to measure the germaneness of the speech, the *Abood* analysis is inapplicable.

¶17 Finally, and critically, the speech in *Abood, Keller,* and *United Foods* was viewpoint driven. In all three cases, the organization chose the funded speech based on its content. Thus, the objectors were compelled to be associated with a group message with which they disagreed. Here, the Clean Elections Act allocates money to all qualifying candidates, regardless of party, position, or message, *see* A.R.S. § 16-951, and thus the surcharge payers are not linked to any specific message, position, or viewpoint. The viewpoint neutrality of the disposition of funds distinguishes this case from *Abood, Keller,* and *United Foods.* We therefore conclude that the *Abood* line of cases does not control the disposition of this case.

¶18 The Real Parties in Interest urge us instead to apply the analysis in *Board of Regents v. Southworth,* 529 U.S. 217 (2000), in assessing the constitutionality of the Clean Elections Act. In *Southworth,* a state university allocated part of a mandatory student fee, on a viewpoint-neutral basis, to various student organizations engaged in ideologically expressive activities. *Id.* at 222-24. To qualify for funding, student organizations had to agree to certain accounting requirements and spending limitations.

¶19 The Court acknowledged that once the university conditioned the opportunity to obtain an education on an agreement to support objectionable speech, the First Amendment was implicated. *Id.* at 231. But it rejected the germaneness test applied in *Abood* and *Keller* as "unworkable" in the context of extracurricular student speech at a university. *Id.* Recognizing that the university's sole purpose in charging the fee was to facilitate "the free and open exchange of ideas by, and among, students," the Court reasoned that "asking what speech is germane would be contrary to the very goal the University seeks to pursue." *Id.* at 229-32. Instead, the Court determined that "the principal standard of protection for objecting students . . . is the requirement of viewpoint neutrality in the allocation of funding support." *Id.* at 233. Although the Court acknowledged that some students were required to pay fees to subsidize speech they found "objectionable, even offensive," the viewpoint neutrality requirement of the student fee program sufficiently protected the students' First Amendment rights. *Id.* at 230.[3]

---

[3] Concurring, Justice Souter observed that the relationship between the fee payer and the objectionable speech was attenuated

(Continued on following page)

¶20 In the case before us, the court of appeals did not find *Southworth* informative, concluding that its analysis applied only in the university setting. *See May*, 203 Ariz. at 18, ¶ 17, 49 P.3d at 290. We think otherwise. While a university is certainly one venue in which the free and open exchange of ideas is encouraged, it is not the only one. Encouraging public debate in the political arena is at least as compelling a public purpose as encouraging speech on a university campus. Moreover, limiting *Southworth* to a university setting overlooks the thrust of the Court's analysis: If the government seeks to facilitate or expand the universe of speech and accomplishes its goal in a viewpoint neutral way, the question whether speech is germane is simply inapposite.

¶21 We find the *Southworth* approach better suited than the *Abood* line of cases for analyzing the constitutionality of the Clean Elections Act. The university's goals in *Southworth* and the government's goals in funding clean elections are similar: Both seek to facilitate free speech. Moreover, both funding systems protect free speech rights by requiring viewpoint neutrality in the allocation of funds and attenuating the connection between the payers of funds and the message communicated. The principles of *Buckley* – that government may use public funds to finance political speech – and *Southworth* – that viewpoint neutrality in the allocation of funds adequately safeguards First Amendment rights – support the conclusion that collecting a surcharge on civil and criminal

---

because the money was distributed in a neutral manner by an agency that had "no social, political, or ideological character." *Southworth*, 529 U.S. at 240 (Souter, J., concurring). The same is true in this case.

fines to fund political campaigns does not violate the First Amendment.

¶22 But May counters that the Act is not viewpoint neutral in two respects. First, he contends that fine payers are forced to support the viewpoint that public financing of campaigns represents good public policy. Yet, as *Buckley* noted, "every appropriation made by [government] uses public money in a manner to which some taxpayers object." 424 U.S. at 92. For example, taxes from the state's general fund are used to pay the salaries of state legislators, some of whom an individual taxpayer might support and others whom the taxpayer might not support. Yet no one would suggest that such payments violate the First Amendment. But government could not function if taxpayers could refuse to pay taxes if they disagreed with the government policy or function that the tax supported.[4] *See United States v. Lee*, 455 U.S. 252, 260 (1982); *see also Southworth*, 529 U.S. at 229. Second, May argues that not all candidates request and receive campaign funds. But *Southworth's* insistence on viewpoint neutrality focused on the government's method of allocating funds, not the resulting viewpoints being supported. *Southworth*, 529 U.S. at 233. The method of allocating funds under the Clean Elections Act is clearly neutral with regard to the

[4] The State makes considerable use of surcharges to fund various public programs. *See, e.g.*, A.R.S. § 12-116.01(A) (criminal justice enhancement fund); A.R.S. § 12-116.02 (medical services enhancement fund); A.R.S. § 12-116.01(B) (fill the gap fund); A.R.S. § 12-116.01(C) (DNA fund).

ideology or message of any candidate and thus passes muster under *Southworth*.[5]

¶23 In a final salvo, amicus participant Pacific Legal Foundation urges that, while "tax dollars . . . may be spent on expressive activity without violating taxpayers' First Amendment rights," the surcharge at issue here is a fee, not a tax, and therefore must be analyzed differently. We conclude, however, that whether the surcharge is a tax or a fee is not dispositive of the issues in this case. Government may no more violate the First Amendment by imposing a tax than it may by imposing a fee. Moreover,

---

[5] May urges that two cases that have invalidated campaign funding schemes should guide the disposition of this case. We do not find either case applicable. In *Butterworth v. Florida*, 604 So.2d 477 (Fla. 1992), the Florida Supreme Court struck down a 1.5% assessment on some contributions to political parties, which assessment was used to fund political campaigns. The court held that the assessment "infringes on First Amendment rights by forcing contributors to decide between contributing to a party and financing causes or persons with whom they disagree or not contributing to a party at all." *Id.* at 481. The Florida statute directly burdened political contributions, which implicated First Amendment speech and association rights that are not burdened under the Arizona law.

In *Vermont Society of Association Executives v. Milne*, 779 A.2d 20 (Vt. 2001), the Supreme Court of Vermont ruled that a tax on lobbyists used to fund political campaigns violated the lobbyists' First Amendment rights. As indicated in ¶ 4 of this opinion, the tax on lobbyists formerly contained in the Clean Elections Act was held to be unconstitutional. That ruling has not been appealed and that issue is not before this court. Moreover, *Milne* does not assist in the analysis here because, unlike the lobbyists in that case, the fine payers whose surcharges funded the Clean Elections Act are a diverse, ephemeral group not "associated" in any meaningful way and not engaged in any First Amendment activity.

Because of their dissimilarity to the case before us, neither *Butterworth* nor *Milne* is helpful in resolving this case.

we have not discovered any compelled funding case in which the outcome turned on whether the assessment was a fee or a tax. Nonetheless, we address the issue briefly.

¶24 Whether an assessment should be categorized as a tax or a fee generally is determined by examining three factors: "(1) the entity that imposes the assessment; (2) the parties upon whom the assessment is imposed; and (3) whether the assessment is expended for general public purposes, or used for the regulation or benefit of the parties upon whom the assessment is imposed." *Bidart Bros. v. Cal. Apple Comm'n,* 73 F.3d 925, 931 (9th Cir. 1996) (citing *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of Puerto Rico,* 967 F.2d 683 (1st Cir. 1992)). All three elements reveal the assessment here as a tax: It was imposed by citizen initiative on a broad range of payers for a public purpose. This conclusion does not end the inquiry, however, for even a tax may be imposed in an unconstitutional way or for an unconstitutional purpose.

¶25 May argues that if the surcharge is a tax, it is an unconstitutional "special tax" requiring strict scrutiny because "it is imposed on less than the whole" population of Arizona citizens and burdens the First Amendment rights of a narrowly defined group of taxpayers. May relies on *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue,* 460 U.S. 575 (1983), and *Murdock v. Pennsylvania,* 319 U.S. 105 (1943), to support his contention that taxes on discrete groups are invalid because of the threat that "government will destroy a selected group of taxpayers by burdensome taxation." *Minneapolis Star,* 460 U.S. at 585.

¶26 We disagree with May's premise that the surcharge does not apply to all Arizonans. It does; any

person who pays a civil or criminal fine is subject to pay the surcharge. Just as any person choosing to purchase a new car or other non-exempt good must pay a tax, any person found to have parked illegally or committed a crime will face the surcharge. No narrow, discrete group of taxpayers is at issue in the case before us, nor are the fine payers exercising a First Amendment right. *Minneapolis Star* and *Murdock* are therefore inapposite.

¶27 The Clean Elections Act's surcharge stands in stark contrast to the tax on paper and ink in *Minneapolis Star* and the attempted license tax on door-to-door religious proselytizing at issue in *Murdock*. The clean elections surcharge is not limited to a particular group or industry, but is assessed against all citizens who pay civil and criminal fines. Nor does the surcharge burden the exercise of a First Amendment right; there is no expressive content inherent in paying a traffic fine. To the extent that civil and criminal fine payers are compelled to fund the Clean Elections Act, the safeguard of viewpoint neutrality in the allocation of funds suffices to mitigate any First Amendment concerns.

CONCLUSION

¶28 In summary, we hold that the surcharge funding provision of the Citizens Clean Elections Act, A.R.S. § 16-940(C), is constitutional. We therefore vacate the opinion of the court of appeals and reinstate the judgment in favor of the Real Parties in Interest.

Rebecca White Berch, Justice

CONCURRING:

Charles E. Jones, Chief Justice

Ruth V. McGregor, Vice Chief Justice

Michael D. Ryan, Justice

John Pelander, Judge*

* Pursuant to Arizona Constitution article VI, section 3, the Honorable John Pelander, Judge of the Arizona Court of Appeals, Division Two, was designated to sit on this case.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STEVE MAY, Petitioner, v. THE HONORABLE COLLEEN A. McNALLY, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, BETSEY BAYLESS, as Secretary of State of the State of Arizona, acting in her official capacity; CAROL SPRINGER, as Treasurer of the State of Arizona, acting in her official capacity; and the CITIZENS CLEAN ELECTIONS COMMISSION; and ARIZONANS FOR CLEAN ELECTIONS, Real Parties in Interest.	) 1 CA-SA 02-0073)) DEPARTMENT D)) **OPINION**)) Filed 6-17-02)) Amended by Order) filed 6-19-02

Petition for Special Action
from the Maricopa County Superior Court

Cause No. CV 2001-006078

The Honorable Colleen A. McNally, Judge

REVERSED

Institute for Justice Arizona Chapter — Phoenix
By Clint Bolick
Timothy D. Keller
Thomas P. Liddy
and
Institute for Justice — Washington, DC
By William H. Mellor
Scott G. Bullock
Attorneys for Petitioner

Janet Napolitano, Attorney General — Phoenix
By Todd F. Lang, Assistant Attorney General
Attorneys for Real Party in Interest – Citizens Clean Elections Commission

Arizona Center for Law in the Public Interest — Phoenix
By Timothy M. Hogan
and
Brennan Center for Justice — New York, NY
at New York University School of Law
By Elizabeth Daniel
Attorneys for Real Party in Interest – Arizonans for Clean Elections

---

WEISBERG, Judge

¶1 Steve May ("Petitioner") seeks special action review of the trial court's decision upholding a provision of the Citizens Clean Elections Act (the "Act"), which permits certain fine surcharges to be distributed to political candidates. *See* Ariz.Rev.Stat. ("A.R.S.") § 16-954(C) (Supp.2001). For the reasons set forth below, we reverse the trial court's decision.

BACKGROUND AND PROCEDURAL HISTORY

¶2 In the 1998 general election, Arizona voters adopted the Act by approving initiative Proposition 200. The Act established a system of campaign finance whereby certain candidates could receive campaign funds in exchange for agreeing to limit campaign contributions and expenditures. The Act also lowered the contribution limits for non-participating candidates and imposed additional reporting requirements on all candidates.

¶3 The campaign funds were to be generated from four different sources: (1) a $5 state income tax check-off; (2) a dollar-for-dollar income tax credit for contributions to the fund up to $500 or twenty percent of taxes owed, whichever was greater; (3) a $100 annual mandatory fee imposed on certain classes of registered lobbyists; and (4) a ten percent surcharge imposed on persons paying civil and criminal fines, including those related to the stopping or standing of motor vehicles. *See* A.R.S. §§ 16-944, -954(A) to (C) (Supp.2001).

¶4 Petitioner is a state legislator who received a parking ticket and was fined $27, which included a ten percent surcharge pursuant to the Act. Petitioner refused to pay the surcharge, claiming that it violated his free speech guarantees under the First Amendment to the United States Constitution and Article 2, Sections 6 and 15 of the Arizona Constitution.[1]

---

[1] The First Amendment to the United States Constitution states, "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . . " The Arizona Constitution, Article 2, Section 6, states, "Every person may freely speak, write, and publish on all subjects,

(Continued on following page)

¶5 Petitioner originally brought an action in federal district court against the Secretary of State and Treasurer seeking a declaration of the Act's invalidity. Citizens Clean Elections Commission and Arizonans for Clean Elections ("ACE") intervened as defendants. In March 2001, the district court dismissed the action for lack of subject matter jurisdiction on the ground that it challenged a state tax and therefore should be initiated in state court. *See Lavis v. Bayless,* No. CIV 99-1627 (D. Ariz. Mar. 13, 2001).

¶6 Petitioner re-filed the action in state court in April 2001. The parties stipulated to the facts and filed cross-motions for summary judgment. In December 2001, the trial court granted Petitioner's motion in part, enjoining the collection of the lobbyist fee and severing that provision from the remainder of the Act.[2] Petitioner then filed a petition for special action in the Arizona Supreme Court, but the court declined to exercise jurisdiction. Petitioner therefore re-filed his special action petition in this court against ACE, the Citizens Clean Elections Commission, and the Secretary of State and Treasurer, as real parties in interest. Only ACE has filed a response.

---

being responsible for the abuse of that right." Section 15 states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." Because we conclude that the Act violates the First Amendment, we do not consider whether the Act similarly violates the Arizona Constitution.

[2] The trial court's order enjoining the collection of the lobbyist fee and severing that provision from the remainder of the Act has not been challenged on appeal.

¶7 This matter involves a purely legal issue that is appropriate for resolution by special action in this court. *See Univ. of Ariz. Health Scis. Ctr. v. Superior Court,* 136 Ariz. 579, 581, 667 P.2d 1294, 1296 (1983) (accepting special action jurisdiction over matter of important public interest that turns entirely on legal issues). This case also presents an important constitutional issue involving the Act and is a matter of statewide importance. *See State ex rel. Woods v. Block,* 189 Ariz. 269, 272, 942 P.2d 428, 431 (1997). Further, there is no adequate remedy by appeal. *See Elrod v. Burns,* 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). We therefore exercise our discretion and accept jurisdiction.

DISCUSSION

¶8 We must decide the constitutionality of the provision of the Act that imposes a ten percent surcharge on all individuals who incur civil and criminal fines. *See* A.R.S. § 16-954(C). Although "the legislature need not look to an express grant of authority in order to justify an enactment," "any exercise of legislative power is subject to the limitations imposed by the constitution." *Citizens Clean Elections Comm'n v. Myers,* 196 Ariz. 516, 520, ¶ 14, 1 P.3d 706, 710 (2000). A constitutional limitation on the exercise of legislative power "may be implied by the text of the constitution or its structure taken as a whole." *Id.* at 521, ¶ 14, 1 P.3d at 711. "That [the Act] was enacted directly by the voters rather than by the state legislature does not change our constitutional analysis. '[V]oters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation.'" *Serv. Employees Int'l Union v. Fair Political Practices Comm'n,*

955 F.2d 1312, 1314 n.1 (9th Cir. 1992) (second alteration in original) (quoting *Citizens Against Rent Control v. Berkeley,* 454 U.S. 290, 295 (1981)).

History of Cases

¶9 Beginning in 1976, the United States Supreme Court has addressed whether compelled fees similar to those imposed by the Act violate the First Amendment's right to freedom of speech. We begin by examining those cases.

¶10 *Buckley v. Valeo,* 424 U.S. 1 (1976), involved the constitutionality of a portion of a federal act that allowed taxpayers to designate that one or two of their tax dollars be paid into a presidential election fund. *Id.* at 86. The money from the fund would then be distributed to qualified political parties. *Id.* at 87-90. Taxpayers challenged the dollar check-off provision because they were not able to designate particular candidates or parties as recipients of their money. *Id.* at 91. The Court rejected the challenge, finding that the funding was "like any other appropriation from the general revenue" and that Congress always used public money in a manner to which some taxpayers objected. *Id.* at 91-92. The Court further commented that the provision represented an effort to "use public money to facilitate and enlarge public discussion and participation in the electoral process." *Id.* at 92-93.

¶11 In *Abood v. Detroit Board of Education,* 431 U.S. 209, 234-36 (1977), and *Keller v. State Bar of California,* 496 U.S. 1, 13-14 (1990), the Court considered the constitutionality of subsidies levied by work-related associations and whether the subsidies were germane to the purposes of the associations. In *Abood,* nonunion public school teachers challenged an agreement requiring them to pay a

service fee equivalent to union dues. 431 U.S. at 211. The objecting teachers claimed that the union's use of the fees to engage in political speech violated their freedom of association as guaranteed by the First and Fourteenth Amendments to the United States Constitution. *Id.* at 213. The Supreme Court agreed. It held that requiring teachers to pay a service fee used "to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative" was unconstitutional. *Id.* at 234.

¶12 In *Keller,* the Supreme Court struck down the use of mandatory state bar dues for political advocacy. 496 U.S. at 13-14. It held that, although the state bar could fund activities "germane" to the association's mission of "regulating the legal profession and improving the quality of legal services," it could not fund activities of an ideological nature that fell outside the scope of regulating the legal profession. *Id.*

¶13 A few years later, the Supreme Court upheld a mandatory fee imposed in a university setting. *Bd. of Regents v. Southworth,* 529 U.S. 217, 229-30 (2000). Students had brought suit against their university, alleging that an activity fee, which was used to support student organizations that engaged in political speech, violated their First Amendment rights. *Id.* at 221. The Supreme Court upheld the fee and specifically declined to engage in the germane analysis applied in *Abood* and *Keller. Id.* at 231-32. The Court explained that,

> In *Abood* and *Keller,* the constitutional rule took the form of limiting the required subsidy to speech germane to the purposes of the union or bar association. The standard of germane speech as applied to student speech at a university is

> unworkable, however, and gives insufficient protection both to the objecting students and to the University program itself. . . .
>
> The speech the University seeks to encourage in the program before us is distinguished not by discernable limits but by its vast, unexplored bounds. To insist upon asking what speech is germane would be contrary to the very goal the University seeks to pursue. It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning.

Id.

¶14 Determining that students in a university setting had protectable First Amendment interests, the Court found that the requirement of viewpoint neutrality in the program was sufficient to protect those interests. *Id.* at 233. Thus, "[w]hen a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others." *Id.* Because the university program respected the principle of viewpoint neutrality, the Court found the program to be consistent with the First Amendment. *Id.* at 234.

¶15 Next, in *United States v. United Foods, Inc.*, 533 U.S. 405, 408-12 (2001), the Supreme Court considered whether a mandatory fee imposed on mushroom handlers to fund advertisements that promoted mushroom sales in general violated the First Amendment. United Foods refused to pay the mandatory fee, claiming that it violated the First Amendment, *id.* at 409, and asserting that it wanted to convey a message that "its brand of mushrooms was superior to those brands grown by other producers." *Id.* at 411. It complained that it was being forced to pay for

a message that any mushrooms were worth consuming, regardless of brand. *Id.*

¶16 Before addressing whether the mandatory fee was constitutional, the Court stated that "a threshold inquiry must be whether there is some state imposed obligation which makes group membership less than voluntary; for it is only the overriding associational purpose which allows any compelled subsidy for speech in the first place." *Id.* at 413. The Court distinguished between cases such as *Abood* and *Keller,* in which objecting members associated for purposes other than paying the subsidies, and *United Foods,* in which mushroom producers did not associate for any purpose other than to pay the fee. *Id.* at 411-12. The Court implied that the latter group was involuntary and therefore subject to a higher standard of scrutiny than the former group. *Id.* at 414. Ultimately, the Court declared that the mandatory fee imposed on the involuntary group of mushroom handlers was unconstitutional because the subsidizing fee was not germane to any *associational* purpose beyond the promoted speech itself. *Id.* at 415-16 ("[T]he expression [the mushroom producers are] required to support is not germane to a purpose related to an association independent from the speech itself. . . . ").

Trial Court Decision

¶17 The trial court relied on *Southworth* in upholding the surcharge. The court reasoned that the surcharge, similar to the activity fee in *Southworth,* facilitated viewpoint neutral speech because there was no required political position that a candidate must adopt in order to qualify for funding. We, however, find that *Southworth* is not applicable here because it merely stated an exception

to the rule rather than the rule itself. That exception was that, in a university setting, "[t]he standard of germane speech as applied to student speech . . . is unworkable." 529 U.S. at 231. Accordingly, a university is treated differently because its mission is to "develop human resources, to discover and disseminate knowledge, to extend knowledge and its application beyond the boundaries of its campuses and to serve and stimulate society by developing in students heightened intellectual, cultural and humane sensitivities . . . and a sense of purpose." *Id.* at 221 (internal quotation marks omitted). Thus, in that setting, a court must dispense with the germane analysis otherwise mandated by *Abood* and *Keller.*

¶18 Here, unlike *Southworth,* there is no equally compelling interest to promote speech when the individuals paying the surcharge and the political speech they fund have no connection. Unlike the students in *Southworth* who *directly* benefitted from the free speech, the surcharge payers are not directly benefitted. Thus the exception applicable in a university setting does not apply in this setting.[3] We, therefore, hold that the trial court erred in applying the principles of *Southworth* to this case.[4]

---

[3] Moreover, the activity fees in *Southworth* funded extracurricular speech, while here the surcharge funds political campaigns. In fact, the university's policies in *Southworth* specifically provided that the activity fee could not be disbursed to groups having a primarily political orientation or to groups that would use such funds for politically partisan purposes, *see id.* at 225-26, whereas the funds here are used specifically for such purposes.

[4] We note that, although the mandatory advertising fee in *United Foods* arguably benefitted some of the mushroom handlers, the Court did not apply or even discuss the holding of *Southworth,* which was

(Continued on following page)

Nature of the Surcharges

¶19 As discussed in *Buckley,* our threshold question is whether the surcharge is more akin to a general tax or to a regulatory fee. The Court in *Buckley* implied that, if it were the former, the surcharge would be constitutional,[5] but not if it were the latter. 424 U.S. at 91-92 (noting that a voluntary tax check-off provision "is like any other appropriation from the general revenue").

¶20 There is a significant distinction between funding a political campaign through a general tax and funding it through a surcharge. An individual who pays a general tax is paying a fee to generally benefit the community; that individual does not have an expectation as to how the funds will be used. Likewise, when the government collects a general tax, it is not collecting the tax for a specific purpose. If and when the government uses existing revenue to fund political campaigns, there is no violation of any individual's expectation – the funds already exist.

¶21 In contrast, an individual who incurs a civil or criminal fine has no expectation that he or she will incur an additional fee to support political campaigns. That individual has no choice in whether to fund or how much to fund such campaigns. In addition, unlike a general tax, the surcharge is not taken from existing government

---

decided a year earlier. We determine that the Court omitted *Southworth* from its discussion because *Southworth* applied distinctly to a university setting that was not present in *United Foods*. For this reason, we similarly do not further consider *Southworth* here.

[5] Because we do not find that the surcharges are akin to a general tax, we need not consider whether the Court in *Buckley* conclusively held that a general tax is constitutional under the First Amendment.

funds; instead, it is an additional charge imposed on a limited group of individuals. We therefore find that the surcharge is more akin to a regulatory fee than to a general tax.

¶22 In reaching this conclusion, we find helpful the discussion in *Bidart Brothers v. California Apple Commission,* 73 F.3d 925, 930 (9th Cir. 1996), concerning the distinction between a general tax and a regulatory fee:

> [The cases] have sketched a spectrum with a paradigmatic tax at one end and a paradigmatic fee at the other. The classic "tax" is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community. The classic "regulatory fee" is imposed by an agency upon those subject to its regulation. It may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive. Or, it may serve such purposes indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses.
>
> Courts facing cases that lie near the middle of this spectrum have tended (sometimes with minor differences reflecting the different statutes at issue) to emphasize the revenue's ultimate use, asking whether it provides a general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays the agency's costs of regulation.

Id. (quoting *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n,* 967 F.2d 683, 685 (1st Cir. 1992)). Here, the surcharge is imposed upon a specific group of individuals,

placed in a special fund, and geared toward a specific purpose: political campaigns. The participating politicians directly benefit from the funds. Accordingly, the surcharge is more like a regulatory fee than a general tax.[6]

Creation of an Association

¶23 We next consider whether the individuals who incur civil and criminal fines thereby become an association and, if so, whether that association is voluntary. *See United Foods,* 533 U.S. at 413 ("[A] threshold inquiry must be whether there is some state imposed obligation which makes group membership less than voluntary; for it is only the overriding associational purpose which allows any compelled subsidy for speech in the first place."). *United Foods* required that involuntary associations be subject to a higher standard of scrutiny than voluntary associations. *Id.* at 414.

¶24 In *United Foods,* the mushroom handlers were not part of an organization related to growing or distributing mushrooms. However, they involuntarily became part of an association by virtue of their duty to pay the mandatory advertising fee. *Id.* at 412-14. We liken the situation in this case to that in *United Foods* and find that the individuals who must pay the civil and criminal fines compose an involuntary association. Here, the surcharge is imposed upon a discrete group of individuals – those who incur civil and criminal fines – who are not otherwise associated.

---

[6] We respectfully disagree with the district court's characterization of the surcharges as a tax and not a regulatory fee. *See Lavis,* No. CIV 99-1627, slip op. at 4-9.

Thus, these persons are forced to associate by virtue of the mandatory surcharge.

Germane Speech

¶25 Having determined that the surcharge is more akin to a regulatory fee than a general tax and that it creates an involuntary association, we engage in the next step of constitutional analysis: determining whether the speech that is being supported is germane to the purpose of the association. *See Abood,* 431 U.S. at 234-36; *see also Keller,* 496 U.S. at 13-14.[7] Petitioner asserts that the trial court skipped this step and that, had it completed it, the court would have found that the individuals who are compelled to pay the surcharge have no connection to the political speech the surcharge helps fund. Also, Petitioner asserts that, because the very purpose of the Act is to promote speech, the surcharge is unconstitutional under *United Foods. See* 533 U.S. at 415 ("We have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself.").

¶26 ACE counters that the lack of connection between Petitioner and the message his payment helps fund is an important distinguishing factor from *Abood* and *Keller,* in which the plaintiffs were compelled to pay dues to organizations with which they were closely associated (a teacher's union and a state bar). However, this distinction does not address the issue of germaneness as the thrust of the germaneness test set forth in *Abood, Keller,* and

[7] Our review necessarily does not consider whether the mandatory fee supports a laudable goal.

United Foods is that the message must be closely connected or "germane" to the association's purpose. Because this standard is not met here, the surcharge is unconstitutional.

¶27 The individuals who incur a civil or criminal fine do not have anything in common except their duty to pay the fine. The political messages the surcharge enables are not related to any overriding purpose shared by these involuntarily associated individuals.

¶28 Furthermore, the fee is collected for the sole purpose of supporting political speech. *See Buckley,* 424 U.S. at 21 (holding that contributions to political campaigns are a form of speech protected by the First Amendment because such contributions reflect an "expression of support for the candidate and his views"). Under *Abood, Keller,* and *United Foods,* such a purpose cannot be supported by a surcharge levied upon an involuntary association.

¶29 We find support for our conclusion in the reasoning of the Florida Supreme Court in *State ex rel. Butterworth v. Republican Party,* 604 So.2d 477, 480 (Fla. 1992), which invalidated on First Amendment grounds an assessment imposed upon political organizations that was earmarked for a campaign finance fund:

> [S]ingling out political parties and associations to support the fund bears no relationship to the interest advanced. There are equally effective means of supporting the trust fund without infringing on the appellees' constitutional rights, such as devoting a larger percentage of the filing fees to the fund or supporting the fund through general revenues.

(Footnote omitted). Similarly, singling out civil and criminal violators to pay the surcharge bears no relationship to the interest of funding a particular elections system. The purpose of the Act may be advanced only through other means which do not violate these individuals' rights.

¶30 We therefore conclude that the surcharge violates the exercise of free speech under the United States Constitution because it is imposed upon a discrete group of individuals who are involuntarily associated and because the supported speech is not germane to the purpose of that association.

CONCLUSION

¶31 Based on the holdings of *Buckley, Abood, Keller,* and *United Foods,* we conclude that A.R.S. § 16-954(C), authorizing a surcharge on civil and criminal fines to finance state elections, imposes an unconstitutional restraint on the exercise of free speech. Because it is severable from the remainder of the Act, the Secretary of State and Treasurer are enjoined from further implementing and performing their duties in administering and enforcing A.R.S. § 16-954(C).

SHELDON H. WEISBERG,
Presiding Judge

CONCURRING:

JON W. THOMPSON, Judge

JOHN C. GEMMILL, Judge

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

12/19/2001

HONORABLE COLLEEN MCNALLY

CV 2001-006078

FILED: 12/21/2001

RICK LAVIS, et al.

v.

BETSY BAYLESS, et al.

TIMOTHY DAVID KELLER

THOMAS I MCCLORY

TIMOTHY M HOGAN
TODD F LAND

RULING

The Court heard oral argument on the parties' cross-motions for summary judgment on November 20, 2001. The Court took the matter under advisement. The Court now rules as follows:

This matter comes before the Court on cross-motions for summary judgment. Motions were filed by Plaintiffs, Defendant-Intervenor Arizonans for Clean Elections, and Defendant Citizens Clean Elections Commission. The parties agree that there are no genuine disputed issues of material fact and have filed a joint statement of facts.

Plaintiffs filed suit requesting declaratory and injunctive relief alleging that the Citizens Clean Election Act violates the United States and Arizona Constitutions. The purpose of the act as set forth in A.R.S. § 16-940 is to:

> create a clean elections system that will improve the integrity of Arizona state government by diminishing the influence of special-interest money,

> will encourage citizen participation in the political process, and will promote freedom of speech under the U.S. and Arizona Constitutions.

The act establishes a system to provide public funding for candidates for state political offices. The system is overseen by the Citizens Clean Elections Commission. After a candidate is certified as qualifying for public funding, the Commission distributes money to the candidate from the Clean Elections Fund. The money for the fund is generated from four different sources: 1) taxpayers may voluntarily contribute to the fund by marking a box at the time of filing state income taxes; 2) qualifying candidates must collect a certain number of $5 contributions from registered voters; 3) lobbyists who work for commercial or for-profit entities must pay an annual $ 100 lobbyist fee; and 4) persons paying civil and criminal fines must pay a 10% surcharge on the fines.

Plaintiffs challenge the Act based upon the third and fourth funding sources. Plaintiff Lavin is a lobbyist who challenges the lobbyist fee. Plaintiff May is a citizen who challenges the 10% surcharge on a parking ticket that he received.

Plaintiffs claim that the lobbyist fees and the fine surcharges are coercive and unconstitutional. Plaintiffs allege violations of the Arizona Constitution and the United States Constitution under the categories of compelled speech, viewpoint discrimination/equal protection, and prior restraint. The lobbyists' fees are challenged on all three grounds, while the fine surcharges are only challenged on the issue of compelled speech.

Compelled Speech

The First Amendment guarantees freedom of speech and freedom to refrain from speech. The United States Supreme Court recognized this concept in upholding the New Hampshire residents' objections to being compelled to display the "Live Free or Die" motto on their license plates. *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977). Plaintiffs contend that a compelled contribution to political campaigns equals compelled political speech.

Several cases support Plaintiffs' position that compelled associations and payments to support a particular political message or viewpoint are prohibited. In each of these cases, however, the compulsory payments supported one particular viewpoint that was not germane to the purpose of the association. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) Michigan law required public school teachers to pay union dues. The teachers objected to the use of their fees to contribute to political candidates and to express political views unrelated to collective bargaining activities. In *Keller v. State Bar of California*, 496 U.S. 1 (1990) lawyers objected to their mandatory bar dues being used to fund ideological activities outside the scope of regulating the legal profession. In *United States and Dept of Agriculture v. United Foods, Inc.*, 121 S.Ct. 2334, 2001 W.S. LEXIS 4904 (2001), the mushroom handlers objected to mandatory payments to support the mushroom industry.

The Clean Elections Act does not compel funding for a particular viewpoint or ideology. Although participating candidates certainly represent specific viewpoints and specific political agendas, there is no inquiry as to the

candidate's position in order to qualify for funding. Nor does a contributor associate themselves with a particular viewpoint by virtue of the compulsory contribution.

Board of Education v. Southworth, 529 U.S. 217. (2000) involved university students who objected to the use of their fees to support political activity. The Court held "the First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral." Like the activity fee in *Southworth*, the Clean Elections Fund facilitates viewpoint neutral speech. Although Plaintiffs contend that the holding is limited to the university setting where the free expression of ideas is encouraged, the Court notes that there is a similar, legitimate government interests expressed in A.R.S. § 16-940.

The Court finds that the Clean Elections Act does not compel speech to support a specific viewpoint or ideology.

Viewpoint Discrimination/Equal Protection

The Clean Elections Act requires commercial and for-profit lobbyists to pay the lobbyist fee, while non-profit lobbyists are exempt. Plaintiffs allege that this constitutes viewpoint discrimination and violates their rights to equal protection.

There is no evidence to suggest that the lobbyist fee regulates speech based on content. The differentiation is based upon the tax status of the lobbyists rather than the character of interests promoted. There is no evidence to suggest that similarly situated persons are being treated

differently and that the different treatment is based on the content of their speech.

Prior Restraint

Plaintiffs allege that the lobbyist fee is a special tax that singles out and burdens lobbyists for engaging in protected First Amendment activities. Defendant Citizens Clean Election Commission contends that there is no prior restraint because the lobbyists are not prohibited from lobbying unless they pay the fee. Defendants also note that there has been no effort to enforce the fee or penalize lobbyists who have not paid it.

Although many prior restraint cases involve the press, rather than lobbyists, petitioning the government for a redress of grievances is clearly expression that is protected by the First Amendment. Where First Amendment interests are at stake, heightened scrutiny is required, regardless of whether or not the taxation is content neutral.

Like the tax at issue before the Vermont Supreme Court, the Clean Elections Act presents a "distinct, independent tax singling out a discrete group of First Amendment speakers." *Vermont Society of Association Executive, et al v. Milne*, 2001 Vt LEXIS 179 (Vt. June 8, 2001), at 22. Although Defendant presents compelling reasons that the tax is related to legitimate public interests, the State does not present any justification for the burden of those interests to be borne by a special tax on lobbyists. There is no claim that the tax is related to defraying the costs of administering lobbying activities.

Defendant Citizens for Clean Elections contends that there is no prior constraint because lobbyists are not

prohibited from lobbying if they do not pay the fee, and that the only enforcement mechanism is an administrative action to collect the debt. The Court finds that the existence of the law creates a prohibition for any lobbyist who respects the law.

The Court finds that A.R.S. §16-944 imposes an unconstitutional prior restraint on the exercise of free speech under Article 2 § 6 and § 15 of the Arizona Constitution and the First Amendment of the United States Constitution.

The Court finds that the remaining sections of the Clean Elections Act are Constitutional.

The Court finds that the unconstitutional portion of the Act is severable from the remainder of the Act. A.R.S. § 16-960 supports the finding of severability, and the Court further finds that the purpose and function of the act is met without the lobbyist fee as a funding source.

IT IS ORDERED granting Plaintiffs' motion for summary judgment as to Counts III and VII. Accordingly,

IT IS ORDERED enjoining Defendants from further implementing and performing their duties in administering and enforcing A.R.S. § 16-944.

IT IS ORDERED denying the remainder of Plaintiffs' motion for summary judgment.

IT IS ORDERED granting Defendant-Intervenor Arizonans for Clean Elections and Defendant Citizens Clean Elections Commissions' motions for summary judgment as to Counts I, II, IV, V, VI, and VIII.

IT IS ORDERED denying Defendants' motions for summary judgment as to Counts III and VII.

A.R.S. § 16-940 (2002)

§ 16-940. Findings and declarations

A. The people of Arizona declare our intent to create a clean elections system that will improve the integrity of Arizona state government by diminishing the influence of special-interest money, will encourage citizen participation in the political process, and will promote freedom of speech under the U.S. and Arizona Constitutions. Campaigns will become more issue-oriented and less negative because there will be no need to challenge the sources of campaign money.

B. The people of Arizona find that our current election-financing system:

1. Allows Arizona elected officials to accept large campaign contributions from private interests over which they have governmental jurisdiction;

2. Gives incumbents an unhealthy advantage over challengers;

3. Hinders communication to voters by many qualified candidates;

4. Effectively suppresses the voices and influence of the vast majority of Arizona citizens in favor of a small number of wealthy special interests;

5. Undermines public confidence in the integrity of public officials;

6. Costs average taxpayers millions of dollars in the form of subsidies and special privileges for campaign contributors;

7. Drives up the cost of running for state office, discouraging otherwise qualified candidates who lack personal wealth or access to special-interest funding; and

8. Requires that elected officials spend too much of their time raising funds rather than representing the public.

---

§ 16-941. Limits on spending and contributions for political campaigns

A. Notwithstanding any law to the contrary, a participating candidate:

1. Shall not accept any contributions, other than a limited number of five-dollar qualifying contributions as specified in section 16-946 and early contributions as specified in section 16-945, except in the emergency situation specified in section 16-954, subsection F.

2. Shall not make expenditures of more than a total of five hundred dollars of the candidate's personal monies for a candidate for legislature or more than one thousand dollars for a candidate for statewide office.

3. Shall not make expenditures in the primary election period in excess of the adjusted primary election spending limit.

4. Shall not make expenditures in the general election period in excess of the adjusted general election spending limit.

5. Shall comply with section 16-948 regarding campaign accounts and section 16-953 regarding returning

unused monies to the citizens clean election fund described in this article.

B. Notwithstanding any law to the contrary, a nonparticipating candidate:

1. Shall not accept contributions in excess of an amount that is twenty percent less than the limits specified in section 16-905, subsections A through G, as adjusted by the secretary of state pursuant to section 16-905, subsection J. Any violation of this paragraph shall be subject to the civil penalties and procedures set forth in section 16-905, subsections L through P and section 16-924.

2. Shall comply with section 16-958 regarding reporting, including filing reports with the secretary of state indicating whenever (A) expenditures other than independent expenditures on behalf of the candidate, from the beginning of the election cycle to any date up to primary election day, exceed seventy percent of the original primary election spending limit applicable to a participating candidate seeking the same office, or (B) contributions to a candidate, from the beginning of the election cycle to any date during the general election period, less expenditures made from the beginning of the election cycle through primary election day, exceed seventy percent of the original general election spending limit applicable to a participating candidate seeking the same office.

C. Notwithstanding any law to the contrary, a candidate, whether participating or nonparticipating:

1. If and only if specified in a written agreement signed by the candidate and one or more opposing candidates and filed with the citizens clean elections

commission, shall not make any expenditure in the primary or general election period exceeding an agreed-upon amount lower than spending limits otherwise applicable by statute.

2. Shall continue to be bound by all other applicable election and campaign finance statutes and rules, with the exception of those provisions in express or clear conflict with the provisions of this article.

D. Notwithstanding any law to the contrary, any person who makes independent expenditures related to a particular office cumulatively exceeding five hundred dollars in an election cycle, with the exception of any expenditure listed in section 16-920 and any independent expenditure by an organization arising from a communication directly to the organization's members, shareholders, employees, affiliated persons, and subscribers, shall file reports with the secretary of state in accordance with section 16-958 so indicating, identifying the office and the candidate or group of candidates whose election or defeat is being advocated, and stating whether the person is advocating election or advocating defeat.

---

§ 16-942. Civil penalties and forfeiture of office

A. The civil penalty for a violation of any contribution or expenditure limit in section 16-941 by or on behalf of a participating candidate shall be ten times the amount by which the expenditures or contributions exceed the applicable limit.

B. In addition to any other penalties imposed by law, the civil penalty for a violation by or on behalf of any

candidate of any reporting requirement imposed by this chapter shall be one hundred dollars per day for candidates for the legislature and three hundred dollars per day for candidates for statewide office. The penalty imposed by this subsection shall be doubled if the amount not reported for a particular election cycle exceeds ten percent of the adjusted primary or general election spending limit. No penalty imposed pursuant to this subsection shall exceed twice the amount of expenditures or contributions not reported. The candidate and the candidate's campaign account shall be jointly and severally responsible for any penalty imposed pursuant to this subsection.

C. Any campaign finance report filed indicating a violation of section 16-941, subsections A or B or section 16-941, subsection C, paragraph 1 involving an amount in excess of ten percent of the sum of the adjusted primary election spending limit and the adjusted general election spending limit for a particular candidate shall result in disqualification of a candidate or forfeiture of office.

D. Any participating candidate adjudged to have committed a knowing violation of section 16-941, subsection A or subsection C, paragraph 1 shall repay from the candidate's personal monies to the fund all monies expended from the candidate's campaign account and shall turn over the candidate's campaign account to the fund.

E. All civil penalties collected pursuant to this article shall be deposited to the fund.

---

§ 16-943. Criminal violations and penalties

A. A candidate, or any other person acting on behalf of a candidate, who knowingly violates section 16-941 is guilty of a Class 1 misdemeanor.

B. Any person who knowingly pays any thing of value or any compensation for a qualifying contribution as defined in section 16-946 is guilty of a Class 1 misdemeanor.

C. Any person who knowingly provides false or incomplete information on a report filed under section 16-958 is guilty of a Class 1 misdemeanor.

---

§ 16-944. Fees imposed on lobbyists

Beginning on January 1, 1999, an annual fee is imposed on all registered lobbyists representing (A) one or more persons in connection with a commercial or for-profit activity except public bodies or (B) a non-profit entity predominately composed of or acting on behalf of a trade association or other grouping of commercial or for-profit entities. The fee shall be in the amount of one hundred dollars annually per lobbyist and shall be collected by the secretary of state and transmitted to the state treasurer for deposit into the fund.

---

§ 16-945. Limits on early contributions

A. A participating candidate may accept early contributions only from individuals and only during the exploratory period and the qualifying period, subject to the following limitations:

1. Notwithstanding any law to the contrary, no contributor shall give, and no participating candidate shall accept, contributions from a contributor exceeding one hundred dollars during an election cycle.

2. Notwithstanding any law to the contrary, early contributions to a participating candidate from all sources for an election cycle shall not exceed, for a candidate for governor, forty thousand dollars or, for other candidates, ten percent of the sum of the original primary election spending limit and the original general election spending limit.

3. Qualifying contributions specified in section 16-946 shall not be included in determining whether the limits in this subsection have been exceeded.

B. Early contributions specified in subsection A of this section and the candidate's personal monies specified in section 16-941, subsection A, paragraph 2 may be spent only during the exploratory period and the qualifying period. Any early contributions not spent by the end of the qualifying period shall be paid to the fund.

C. If a participating candidate has a debt from an election campaign in this state during a previous election cycle in which the candidate was not a participating candidate, then, during the exploratory period only, the candidate may accept, in addition to early contributions specified in subsection A of this section, contributions subject to the limitations in section 16-941, subsection B, paragraph 1, or may exceed the limit on personal monies in section 16-941, subsection A, paragraph 2, provided that such contributions and monies are used solely to retire such debt.

---

§ 16-946. Qualifying contributions

A. During the qualifying period, a participating candidate may collect qualifying contributions, which shall be paid to the fund.

B. To qualify as a "qualifying contribution," a contribution must be:

1. Made by a qualified elector as defined in section 16-121, who at the time of the contribution is registered in the electoral district of the office the candidate is seeking and who has not given another qualifying contribution to that candidate during that election cycle;

2. Made by a person who is not given anything of value in exchange for the qualifying contribution;

3. In the sum of five dollars, exactly;

4. Received unsolicited during the qualifying period or solicited during the qualifying period by a person who is not employed or retained by the candidate and who is not compensated to collect contributions by the candidate or on behalf of the candidate;

5. If made by check or money order, made payable to the candidate's campaign committee, or if in cash, deposited in the candidate's campaign committee's account; and

6. Accompanied by a three-part reporting slip that includes the printed name, registration address, and signature of the contributor, the name of the candidate for whom the contribution is made, the date, and the printed name and signature of the solicitor.

C. A copy of the reporting slip shall be given as a receipt to the contributor, and another copy shall be retained by the candidate's campaign committee. Delivery of an original reporting slip to the secretary of state shall excuse the candidate from disclosure of these contributions on campaign finance reports filed under article 1 of this chapter.

---

§ 16-947. Certification as a participating candidate

A. A candidate who wishes to be certified as a participating candidate shall, before the end of the qualifying period, file an application with the secretary of state, in a form specified by the citizens clean elections commission.

B. The application shall identify the candidate, the office that the candidate plans to seek, and the candidate's party, if any, and shall contain the candidate's signature, under oath, certifying that:

1. The candidate has complied with the restrictions of section 16-941, subsection A during the election cycle to date.

2. The candidate's campaign committee and exploratory committee have filed all campaign finance reports required under article 1 of this chapter during the election cycle to date and that they are complete and accurate.

3. The candidate will comply with the requirements of section 16-941, subsection A during the remainder of the election cycle and, specifically, will not accept private contributions.

C. The commission shall act on the application within one week. Unless, within that time, the commission denies an application and provides written reasons that all or part of a certification in subsection B of this section is incomplete or untrue, the candidate shall be certified as a participating candidate. If the commission denies an application for failure to file all complete and accurate campaign finance reports or failure to make the certification in subsection B, paragraph 3 of this section, the candidate may reapply within two weeks of the commission's decision by filing complete and accurate campaign finance reports and another sworn certification.

---

§ 16-948. Controls on participating candidates, campaign accounts

A. A participating candidate shall conduct all financial activity through a single campaign account of the candidate's campaign committee. A participating candidate shall not make any deposits into the campaign account other than those permitted under sections 16-945 or 16-946.

B. A candidate may designate other persons with authority to withdraw funds from the candidate's campaign account. The candidate and any person so designated shall sign a joint statement under oath promising to comply with the requirements of this title.

C. The candidate or a person authorized under subsection B of this section shall pay monies from a participating candidate's campaign account directly to the person providing goods or services to the campaign and shall identify, on a report filed pursuant to article 1 of this

chapter, the full name and street address of the person and the nature of the goods and services and compensation for which payment has been made. Notwithstanding the previous sentence, a campaign committee may establish one or more petty cash accounts, which in aggregate shall not exceed one thousand dollars at any time. No single expenditure shall be made from a petty cash account exceeding one hundred dollars.

D. Monies in a participating candidate's campaign account shall not be used to pay fines or civil penalties, for costs or legal fees related to representation before the commission, or for defense of any enforcement action under this chapter. Nothing in this subsection shall prevent a participating candidate from having a legal defense fund.

---

§ 16-949. Caps on spending from citizens clean elections fund

A. The commission shall not spend, on all costs incurred under this article during a particular calendar year, more than five dollars times the number of Arizona resident personal income tax returns filed during the previous calendar year. Tax reductions and tax credits awarded to taxpayers pursuant to section 16-954, subsections A and B shall not be considered costs incurred under this article for purposes of this section. The commission may exceed this limit during a calendar year, provided that it is offset by an equal reduction of the limit during another calendar year during the same four-year period beginning January 1 immediately after a gubernatorial election.

B. The commission may use up to ten percent of the amount specified in subsection A of this section for reasonable and necessary expenses of administration and enforcement, including the activities specified in section 16-956, subsection A, paragraphs 3 through 7 and subsections B and C. Any portion of the ten percent not used for this purpose shall remain in the fund.

C. The commission shall apply ten percent of the amount specified in subsection A of this section for reasonable and necessary expenses associated with voter education, including the activities specified in section 16-956, subsection A.

D. The state treasurer shall administer a citizens clean election fund from which costs incurred under this article shall be paid. The auditor general shall review the monies in, payments into, and expenditures from the fund no less often than every four years.

---

§ 16-950. Qualification for clean campaign funding

A. A candidate who has made an application for certification may also apply, in accordance with subsection B of this section, to receive funds from the citizens clean elections fund, instead of receiving private contributions.

B. To receive any clean campaign funding, the candidate must present to the secretary of state no later than one week after the end of the qualifying period a list of names of persons who have made qualifying contributions pursuant to section 16-946 on behalf of the candidate. The list shall be divided by county. At the same time, the candidate must tender to the secretary of state the

original reporting slips identified in section 16-946, subsection C for persons on the list and an amount equal to the sum of the qualifying contributions collected. The secretary of state shall deposit the amount into the fund.

C. The secretary of state shall select at random a sample of five percent of the number of non-duplicative names on the list and forward facsimiles of the selected reporting slips to the county recorder for the counties of the addresses specified in the selected slips. Within ten days, the county recorders shall provide a report to the secretary of state identifying as disqualified any slips that are unsigned or undated or that the recorder is unable to verify as matching a person who is registered to vote, on the date specified on the slip, inside the electoral district of the office the candidate is seeking. The secretary of state shall multiply the number of slips not disqualified by twenty, and if the result is greater than one hundred and ten percent of the quantity required, shall approve the candidate for funds, and if the result is less than ninety percent of the quantity required, shall deny the application for funds. Otherwise, the secretary of state shall forward facsimiles of all of the slips to the county recorders for verification, and the county recorders shall check all slips in accordance with the process above.

D. To qualify for clean campaign funding, a candidate must have been approved as a participating candidate pursuant to section 16-947 and have obtained the following number of qualifying contributions:

1. For a candidate for legislature, two hundred.

2. For candidate for mine inspector, five hundred.

3. For a candidate for treasurer, superintendent of public instruction, or corporation commission, one thousand five hundred.

4. For a candidate for secretary of state or attorney general, two thousand five hundred.

5. For a candidate for governor, four thousand.

E. To qualify for clean campaign funding, a candidate must have met the requirements of this section and either be an independent candidate or meet the following standards:

1. To qualify for funding for a party primary election, a candidate must have properly filed nominating papers and nominating petitions with signatures pursuant to chapter 3, articles 2 and 3 of this title in the primary of a political organization entitled to continued representation on the official ballot in accordance with section 16-804.

2. To qualify for clean campaign funding for a general election, a candidate must be a party nominee of such a political organization.

---

§ 16-951. Clean campaign funding

A. At the beginning of the primary election period, the commission shall pay from the fund to the campaign account of each candidate who qualifies for clean campaign funding:

1. For a candidate who qualifies for clean campaign funding for a party primary election, an amount equal to the original primary election spending limit;

2. For an independent candidate who qualifies for clean campaign funding, an amount equal to seventy percent of the sum of the original primary election spending limit and the original general election spending limit; or

3. For a qualified participating candidate who is unopposed for an office in that candidate's primary, in the primary of any other party, and by any opposing independent candidate, an amount equal to five dollars times the number of qualifying contributions for that candidate certified by the commission.

B. At any time after the first day of January of an election year, any candidate who has met the requirements of section 16-950 may sign and cause to be filed a nomination paper in the form specified by section 16-311, subsection A, with a nominating petition and signatures, instead of filing such papers after the earliest time set for filing specified by that subsection. Upon such filing and verification of the signatures, the commission shall pay the amount specified in subsection A of this section immediately, rather than waiting for the beginning of the primary election period.

C. At the beginning of the general election period, the commission shall pay from the fund to the campaign account of each candidate who qualifies for clean campaign funding for the general election, except those candidates identified in subsection A, paragraphs 2 or 3 or subsection D of this section, an amount equal to the original general election spending limit.

D. At the beginning of the general election period, the commission shall pay from the fund to the campaign account of a qualified participating candidate who has not

received funds pursuant to subsection A, paragraph 3 of this section and who is unopposed by any other party nominee or any opposing independent candidate an amount equal to five dollars times the number of qualifying contributions for that candidate certified by the commission.

E. The special original general election spending limit, for a candidate who has received funds pursuant to subsection A, paragraphs 2 or 3 or subsection D of this section, shall be equal to the amount that the commission is obligated to pay to that candidate.

---

§ 16-952. Equal funding of candidates

A. Whenever during a primary election period a report is filed, or other information comes to the attention of the commission, indicating that a nonparticipating candidate who is not unopposed in that primary has made expenditures during the election cycle to date exceeding the original primary election spending limit, including any previous adjustments, the commission shall immediately pay from the fund to the campaign account of any participating candidate in the same party primary as the nonparticipating candidate an amount equal to any excess of the reported amount over the primary election spending limit, as previously adjusted, and the primary election spending limit for all such participating candidates shall be adjusted by increasing it by the amount that the commission is obligated to pay to a participating candidate.

B. Whenever during a general election period a report has been filed, or other information comes to the attention of the commission, indicating that the amount a

nonparticipating candidate who is not unopposed has received in contributions during the election cycle to date less the amount of expenditures the nonparticipating candidate made through the end of the primary election period exceeds the original general election spending limit, including any previous adjustments, the commission shall immediately pay from the fund to the campaign account of any participating candidate qualified for the ballot and seeking the same office as the nonparticipating candidate an amount equal to any excess of the reported difference over the general election spending limit, as previously adjusted, and the general election spending limit for all such participating candidates shall be adjusted by increasing it by the amount that the commission is obligated to pay to a participating candidate.

C. For purposes of subsections A and B of this section the following expenditures reported pursuant to this article shall be treated as follows:

1. Independent expenditures against a participating candidate shall be treated as expenditures of each opposing candidate, for purpose of subsection A of this section, or contributions to each opposing candidate, or purpose of subsection B of this section.

2. Independent expenditures in favor of one or more nonparticipating opponents of a participating candidate shall be treated as expenditures of those nonparticipating candidates, for purpose of subsection A of this section, or contributions to those nonparticipating candidates, for purpose of subsection B of this section.

3. Independent expenditures in favor of a participating candidate shall be treated, for every opposing participating candidate, as though the independent

expenditures were an expenditure of a nonparticipating opponent, for purpose of subsection A of this section, or a contribution to a nonparticipating opponent, for purpose of subsection B of this section.

4. Expenditures made during the primary election period by or on behalf of an independent candidate or a nonparticipating candidate who is unopposed in a party primary, shall be treated as though made during the general election period, and equalizing funds pursuant to subsection B of this section shall be paid at the start of the general election period.

5. Expenditures made before the general election period that consist of a contract, promise, or agreement to make an expenditure during the general election period resulting in an extension of credit shall be treated as though made during the general election period, and equalizing funds pursuant to subsection B of this section shall be paid at the start of the general election period.

6. Expenditures for or against a participating candidate promoting or opposing more than one candidate who are not running for the same office shall be allocated by the commission among candidates for different offices based on the relative size or length and relative prominence of the reference to candidates for different offices.

D. Upon applying for citizen funding pursuant to section 16-950, a participating candidate for legislature in a one-party-dominant legislative district who is qualified for clean campaign funding for the party primary election of the dominant party may choose to reallocate a portion of funds from the general election period to the primary election period. At the beginning of the primary election period, the commission shall pay from the fund to the

campaign account of a participating candidate who makes this choice an extra amount equal to fifty percent of the original primary election spending limit, and the original primary election spending limit for the candidate who makes this choice shall be increased by the extra amount. For a primary election in which one or more participating candidates have made this choice, funds shall be paid under subsections A and B of this section only to the extent of any excess over the original primary election spending limit as so increased. If a participating candidate who makes this choice becomes qualified for clean campaign funding for the general election, the amount the candidate receives at the beginning of the general election period shall be reduced by the extra amount received at the beginning of the primary election period, and the original general election spending limit for that candidate shall be reduced by the extra amount. For a general election in which a participating candidate has made this choice, funds shall be paid under subsections A and B of this section only to the extent of any excess over the original general election spending limit, without such reduction, unless the candidate who has made this choice is the only participating candidate in the general election, in which case such funds shall be paid to the extent of excess over the original general election spending limit with such reduction. For purpose of this subsection, a one-party-dominant legislative district is a district in which the number of registered voters registered in the party with the highest number of registered voters exceeds the number of registered voters registered to each of the other parties by an amount at least as high as ten percent of the total number of voters registered in the district. The status of a district as a one-party-dominant legislative

district shall be determined as of the beginning of the qualifying period.

E. If an adjusted spending limit reaches three times the original spending limit for a particular election, then the commission shall not pay any further amounts from the fund to the campaign account of any participating candidate, and the spending limit shall not be adjusted further.

---

§ 16-953. Return of monies to the citizens clean elections fund

A. At the end of the primary election period, a participating candidate who has received monies pursuant to section 16-951, subsection A, paragraph 1 shall return to the fund all monies in the candidate's campaign account above an amount sufficient to pay any unpaid bills for expenditures made during the primary election period and for goods or services directed to the primary election.

B. At the end of the general election period, a participating candidate shall return to the fund all monies in the candidate's campaign account above an amount sufficient to pay any unpaid bills for expenditures made before the general election and for goods or services directed to the general election.

C. A participating candidate shall pay all uncontested and unpaid bills referenced in this section no later than thirty days after the primary or general election. A participating candidate shall make monthly reports to the commission concerning the status of the dispute over any contested bills. Any monies in a candidate's campaign

account after payment of bills shall be returned promptly to the fund.

D. If a participating candidate is replaced pursuant to section 16-343, and the replacement candidate files an oath with the secretary of state certifying to section 16-947, subsection B, paragraph 3, the campaign account of the participating candidate shall be transferred to the replacement candidate and the commission shall certify the replacement candidate as a participating candidate without requiring compliance with section 16-950 or the remainder of section 16-947. If the replacement candidate does not file such an oath, the campaign account shall be liquidated and all remaining monies returned to the fund.

---

§ 16-954. Clean elections tax reduction; return of excess monies

A. For tax years beginning on or after January 1, 1998, a taxpayer who files on a state income tax return form may designate a five-dollar voluntary contribution per taxpayer to the fund by marking an optional check-off box on the first page of the form. A taxpayer who checks this box shall receive a five-dollar reduction in the amount of tax, and five dollars from the amount of taxes paid shall be transferred by the department of revenue to the fund. The department of revenue shall provide check-off boxes, identified as the clean elections fund tax reduction, on the first page of income tax return forms, for designations pursuant to this subsection.

B. Any taxpayer may make a voluntary donation to the fund by designating the fund on an income tax return form filed by the individual or business entity or by

making a payment directly to the fund. Any taxpayer making a donation pursuant to this subsection shall receive a dollar-for-dollar tax credit not to exceed twenty percent of the tax amount on the return or five hundred dollars per taxpayer, whichever is higher. Donations made pursuant to this section are otherwise not tax deductible and cannot be designated as for the benefit of a particular candidate, political party, or election contest. The department of revenue shall transfer to the fund all donations made pursuant to this subsection. The department of revenue shall provide a space, identified as the clean elections fund tax credit, on the first page of income tax return forms, for donations pursuant to this subsection.

C. Beginning January 1, 1999, an additional surcharge of ten percent shall be imposed on all civil and criminal fines and penalties collected pursuant to section 12-116.01 and shall be deposited into the fund.

D. At least once per year, the commission shall project the amount of monies that the fund will collect over the next four years and the time such monies shall become available. Whenever the commission determines that the fund contains more monies than the commission determines that it requires to meet current debts plus expected expenses, under the assumption that expected expenses will be at the expenditure limit in section 16-949, subsection A, and taking into account the projections of collections, the commission shall designate such monies as excess monies and so notify the state treasurer, who shall thereupon return the excess monies to the general fund.

E. At least once per year, the commission shall project the amount of citizen funding for which all candidates will have qualified pursuant to this article for the

following calendar year. By the end of each year, the commission shall announce whether the amount that the commission plans to spend the following year pursuant to section 16-949, subsection A exceeds the projected amount of citizen funding. If the commission determines that the fund contains insufficient monies or the spending cap would be exceeded were all candidate's accounts to be fully funded, then the commission may include in the announcement specifications for decreases in the following parameters, based on the commission's projections of collections and expenses for the fund, made in the following order:

1. First, the commission may announce a decrease in the matching cap under section 16-952, subsection E from three times to an amount between three and one times.

2. Next, the commission may announce that the fund will provide equalization monies under section 16-952, subsections A and B as a fraction of the amounts there specified.

3. Finally, the commission may announce that the fund will provide monies under section 16-951 as a fraction of the amounts there specified.

F. If the commission cannot provide participating candidates with all monies specified under sections 16-951 and 16-952, as decreased by any announcement pursuant to subsection E of this section, then the commission shall allocate any reductions in payments proportionately among candidates entitled to monies and shall declare an emergency. Upon declaration of an emergency, a participating candidate may accept private contributions to bring

the total monies received by the candidate from the fund and from such private contributions up to the adjusted spending limits, as decreased by any announcement made pursuant to subsection E of this section.

---

§ 16-955. Citizens clean election commission; structure

A. The citizens clean elections commission is established consisting of five members. No more than two members of the commission shall be members of the same political party. No more than two members of the commission shall be resident of the same county. No one shall be appointed as a member who does not have a registration pursuant to chapter 1 of this title that has been continuously recorded for at least five years immediately preceding appointment with the same political party or as an independent.

B. The commission on appellate court appointments shall nominate candidates for vacant commissioner positions who are committed to enforcing this article in an honest, independent, and impartial fashion and to seeking to uphold public confidence in the integrity of the electoral system. Each candidate shall be a qualified elector who has not, in the previous five years in this state, been appointed to, been elected to, or run for any public office, including precinct committeeman, or served as an officer of a political party.

C. Initially, the commission on appellate court appointments shall nominate the five slates, each having three candidates, before January 1, 1999. No later than February 1, 1999, the governor shall select one candidate from one of the slates to serve on the commission for a

term ending January 31, 2004. Next, the highest-ranking official holding a statewide office who is not a member of the same political party as the governor shall select one candidate from another one of the slates to serve on the commission for a term ending January 31, 2003. Next, the second-highest-ranking official holding a statewide office who is a member of the same political party as the governor shall select one candidate from one of the three remaining slates to serve on the commission for a term ending January 31, 2002. Next, the second-highest-ranking official holding a statewide office who is not a member of the same political party as the governor shall select one candidate from one of the two remaining slates to serve on the commission for a term ending January 31, 2001. Finally, the third-highest-ranking official holding a statewide office who is a member of the same political party as the governor shall elect one candidate from the last slate to serve on the commission for a term ending January 31, 2000. For purpose of this section, the ranking of officials holding statewide office shall be governor, secretary of state, attorney general, treasurer, superintendent of public instruction, corporation commissioners in order of seniority, mine inspector, the members of the supreme court in order of seniority, senate majority and minority leaders, and house majority and minority leaders.

D. One commissioner shall be appointed for a five-year term beginning February 1 of every year beginning with the year 2000. The commission on appellate court appointments shall nominate one slate of three candidates before January 1 of each year beginning in the year 2000, and the governor and the highest-ranking official holding

a statewide office who is not a member of the same political party as the governor shall alternate filling such vacancies. The vacancy in the year 2000 shall be filled by the governor.

E. Members of the commission may be removed by the governor, with concurrence of the senate, for substantial neglect of duty, gross misconduct in office, inability to discharge the powers and duties of office, or violation of this section, after written notice and opportunity for a response.

F. If a commissioner does not complete his or her term of office for any reason, the commission on appellate court appointments shall nominate one slate of three candidates as soon as possible in the first thirty days after the commissioner vacates his or her office and a replacement shall be selected from the slate within thirty days of nomination of the slate. The highest-ranking official holding a statewide office who is a member of the political party of the official who nominated the commissioner who vacated office shall nominate the replacement, who shall serve as commissioner for the unexpired portion of the term. A vacancy or vacancies shall not impair the right of the remaining members to exercise all of the powers of the board.

G. Commissioners are eligible to receive compensation in an amount of two hundred dollars for each day on which the commission meets and reimbursement of expenses pursuant to title 38, chapter 4, article 2.

H. The commissioners shall elect a chair to serve for each calendar-year period from among their members whose terms expire after the conclusion of that year. Three commissioners shall constitute a quorum.

I. A member of the commission shall serve no more than one term and is not eligible for reappointment. No commissioner, during his or her tenure or for three years thereafter, shall seek or hold any other public office, serve as an officer of any political committee, or employ or be employed as a lobbyist.

J. The commission shall appoint an executive director who shall not be a member of the commission and who shall serve at the pleasure of the commission. The executive director is eligible to receive compensation set by the board within the range determined under section 38-611. The executive director, subject to title 41, chapter 4, articles 5 and 6, shall employ, determine the conditions of employment, and specify the duties of administrative, secretarial, and clerical employees as the director deems necessary.

---

§ 16-956. Voter education and enforcement duties

A. The commission shall:

1. Develop a procedure for publishing a document or section of a document having a space of predefined size for a message chosen by each candidate. For the document that is mailed before the primary election, the document shall contain the names of every candidate for every statewide and legislative district office in that primary election without regard to whether the candidate is a participating candidate or a nonparticipating candidate. For the document that is mailed before the general election, the document shall contain the names of every candidate for every statewide and legislative district office in that general election without regard to whether the

candidate is a participating candidate or a nonparticipating candidate. The commission shall mail one copy of each document to every household that contains a registered voter. For the document that is mailed before the primary election, the mailing may be made over a period of days but shall be mailed in order to be delivered to households before the earliest date for receipt by registered voters of any requested early ballots for the primary election. The commission may mail the second document over a period of days but shall mail the second document in order to be delivered to households before the earliest date for receipt by registered voters of any requested early ballots for the general election. The primary election and general election documents published by the commission shall comply with all of the following:

(a) For any candidate who does not submit a message pursuant to this paragraph, the document shall include with the candidate's listing the words "no statement submitted".

(b) The document shall have printed on its cover the words "citizens clean elections commission voter education guide" and the words "primary election" or "general election" and the applicable year. The document shall also contain at or near the bottom of the document cover in type that is no larger than one-half the size of the type used for "citizens clean elections commission voter education guide" the words "paid for by the citizens clean elections fund".

(c) In order to prevent voter confusion, the document shall be easily distinguishable from the publicity pamphlet that is required to be produced by the secretary of state pursuant to section 19-123.

2. Sponsor debates among candidates, in such manner as determined by the commission. The commission shall require participating candidates to attend and participate in debates and may specify by rule penalties for nonparticipation. The commission shall invite and permit nonparticipating candidates to participate in debates.

3. Prescribe forms for reports, statements, notices and other documents required by this article.

4. Prepare and publish instructions setting forth methods of bookkeeping and preservation of records to facilitate compliance with this article and explaining the duties of persons and committees under this article.

5. Produce a yearly report describing the commission's activities and any recommendations for changes of law, administration or funding amounts and accounting for monies in the fund.

6. Adopt rules to implement the reporting requirements of section 16-958, subsections D and E.

7. Enforce the provisions of this article, ensure that money from the fund is placed in candidate campaign accounts or otherwise spent as specified in this article and not otherwise, monitor reports filed pursuant to this chapter and financial records of candidates as needed to ensure that equalization monies are paid promptly to opposing qualified candidates under section 16-952 and ensure that money required by this article to be paid to the fund is deposited in the fund.

B. The commission may subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require by subpoena the

production of any books, papers, records or other items material to the performance of the commission's duties or the exercise of its powers.

C. The commission may adopt rules to carry out the purposes of this article and to govern procedures of the commission. Commission rule making is exempt from Title 41, Chapter 6, Article 3, except that the commission shall submit the rules for publication and the secretary of state shall publish the rules in the Arizona administrative register. The commission shall propose and adopt rules in public meetings, with at least sixty days allowed for interested parties to comment after the rules are proposed.

D. Based on the results of the elections in the year 2002 or any quadrennial election thereafter, and within six months after such election, the commission may adopt rules changing the number of qualifying contributions required for any office from those listed in section 16-950, subsection D, by no more than twenty per cent of the number applicable for the preceding election.

---

§ 16-957. Enforcement procedure

A. If the commission finds that there is reason to believe that a person has violated any provision of this article, the commission shall serve on that person an order stating with reasonable particularity the nature of the violation and requiring compliance within fourteen days. During that period, the alleged violator may provide any explanation to the commission, comply with the order, or enter into a public administrative settlement with the commission.

B. Upon expiration of the fourteen days, if the commission finds that the alleged violator remains out of compliance, the commission shall make a public finding to that effect and issue an order assessing a civil penalty in accordance with section 16-942, unless the commission publishes findings of fact and conclusions of law expressing good cause for reducing or excusing the penalty. The violator has fourteen days from the date of issuance of the order assessing the penalty to appeal to the superior court as provided in title 12, chapter 7, article 6.

C. Any candidate in a particular election contest who believes that any opposing candidate has violated this article for that election may file a complaint with the commission requesting that action be taken pursuant to this section. If the commission fails to make a finding under subsection A of this section within thirty days after the filing of such a complaint, the candidate may bring a civil action in the superior court to impose the civil penalties prescribed in this section.

---

§ 16-958. Manner of filing reports

A. Any person who has previously reached the dollar amount specified in section 16-941, subsection D for filing an original report shall file a supplemental report each time previously unreported independent expenditures specified by that subsection exceeds one thousand dollars. Any person who has previously reached the dollar amounts specified in section 16-941, subsection B, paragraph 2 for filing an original report shall file a supplemental report to declare that previously unreported expenditures or contributions specified by that paragraph

exceed (1) ten percent of the original primary election spending limit or twenty-five thousand dollars, whichever is lower, before the general election period, or (2) ten percent of the original general election spending limit or twenty-five thousand dollars, whichever is lower, during the general election period. Such reports shall be filed at the times specified in subsection B of this section and shall identify the dollar amount being reported, the candidate, and the date.

B. Any person who must file an original report pursuant to section 16-941, subsection B, paragraph 2 or subsection D, or who must file a supplemental report for previously unreported amounts pursuant to subsection A of this section, shall file as follows:

1. Before the beginning of the primary election period, the person shall file a report on the first of each month, unless the person has not reached the dollar amount for filing an original or supplemental report on that date.

2. Thereafter, except as stated in paragraph 3 of this subsection, the person shall file a report on any Tuesday by which the person has reached the dollar amount for filing an original or supplemental report.

3. During the last two weeks before the primary election and the last two weeks before the general election, the person shall file a report within one business day of reaching the dollar amount for filing an original or supplemental report.

C. Any filing under this article on behalf of a candidate may be made by the candidate's campaign committee. All candidates shall deposit any check received by and

intended for the campaign and made payable to the candidate or the candidate's campaign committee, and all cash received by and intended for the campaign, in the candidate's campaign account before the due date of the next report specified in subsection B of this section. No candidate or person acting on behalf of a candidate shall conspire with a donor to postpone delivery of a donation to the campaign for the purpose of postponing the reporting of the donation in any subsequent report.

D. The secretary of state shall immediately notify the commission of the filing of each report under this section and deliver a copy of the report to the commission, and the commission shall promptly mail or otherwise deliver a copy of each report filed pursuant to this section to all participating candidates opposing the candidate identified in section 16-941, subsection B, paragraph 2 or subsection D.

E. Any report filed pursuant to this section or section 16-916, subsection A, paragraph 1 or subsection B shall be filed in electronic format. The secretary of state shall distribute computer software to political committees to accommodate such electronic filing.

F. During the primary election period and the general election period, all candidates shall make available for public inspection all bank accounts, campaign finance reports, and financial records relating to the candidate's campaign, either by immediate disclosure through electronic means or at the candidate's campaign headquarters, in accordance with rules adopted by the commission.

---

§ 16-959. Inflationary and other adjustments of dollar values

A. Every two years, the secretary of state shall modify the dollar values specified in the following parts of this article, in the manner specified by section 16-905, subsection J, to account for inflation: section 16-941, subsection A, paragraph 2 or subsection D; section 16-942, subsection B; section 16-944; section 16-945, subsection A, paragraphs 1 and 2; section 16-948, paragraph C; section 16-954, subsection B; section 16-955, subsection G; and section 16-961, subsections G and H. In addition, the secretary of state shall make a similar inflation adjustment by modifying the dollar values in section 16-949, subsection A and section 16-954, subsection A to the nearest dollar. In addition, every two years, the secretary of state shall change the dollar values in section 16-961, subsections G and H in proportion to the change in the number of Arizona resident personal income tax returns filed during the previous calendar year.

B. Based on the results of the elections in the year 2002 or any quadrennial election thereafter, and within six months after such election, the commission may adopt rules in a public meeting reallocating funds available to all candidates between the primary and general elections by selecting a fraction for primary election spending limits that is between one third and one half of the spending limits for the election as a whole. For each office, the primary election spending limit shall be modified to be the sum of the primary and general spending limits times the selected fraction, and the general election spending limit shall be modified to be the same sum times one less the selected fraction.

§ 16-960. Severability

If a provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable. In any court challenge to the validity of this article, the commission and Arizonans for clean elections shall have standing to intervene.

---

§ 16-961. Definitions

A. The terms "candidate's campaign committee," "contribution," "expenditures," "exploratory committee," "independent expenditure," "personal monies," "political committee," and "statewide office" are defined in section 16-901.

B. 1. "Election cycle" means the period between successive general elections for a particular office.

2. "Exploratory period" means the period beginning on the day after a general election and ending the day before the start of the qualifying period.

3. "Qualifying period" means the period beginning on the first day of August in a year preceding an election, for an election for a statewide office, or on the first day of January of an election year, for an election for legislator, and ending seventy-five days before the day of the general election.

4. "Primary election period" means the nine-week period ending on the day of the primary election.

5. "General election period" means the period beginning on the day after the primary election and ending on the day of the general election.

6. For any recall election, the qualifying period shall begin when the election is called and last for thirty days, there shall be no primary election period, and the general election period shall extend from the day after the end of the qualifying period to the day of the recall election. For recall elections, any reference to "general election" in this article shall be treated as if referring to the recall election.

C. 1. "Participating candidate" means a candidate who becomes certified as a participating candidate pursuant to section 16-947.

2. "Nonparticipating candidate" means a candidate who does not become certified as a participating candidate pursuant to section 16-947.

3. Any limitation of this article that is applicable to a participating candidate or a nonparticipating candidate shall also apply to that candidate's campaign committee or exploratory committee.

D. "Commission" means the citizens clean elections commission established pursuant to section 16-955.

E. "Fund" means the citizens clean election fund defined by this article.

F. 1. "Party nominee" means a person who has been nominated by a political party pursuant to sections 16-301 or 16-343.

2. "Independent candidate" means a candidate who has properly filed nominating papers and nominating petitions with signatures pursuant to section 16-341.

3. "Unopposed," with reference to an election for a member of the house of representatives, means opposed by no more than one other candidate.

G. "Primary election spending limits" means:

1. For a candidate for legislature, ten thousand dollars.

2. For [sic] candidate for mine inspector, twenty thousand dollars.

3. For a candidate for treasurer, superintendent of public instruction, or corporation commission, forty thousand dollars.

4. For a candidate for secretary of state or attorney general, eighty thousand dollars.

5. For a candidate for governor, three hundred eighty thousand dollars.

H. "General election spending limits" means amounts fifty percent greater than the amounts specified in subsection G of this section.

I. 1. "Original" spending limit means a limit specified in subsections G and H of this section, as adjusted pursuant to section 16-959, or a special amount expressly set for a particular candidate by a provision of this title.

2. "Adjusted" spending limit means an original spending limit as further adjusted to account for reported overages pursuant to section 16-952.

Supreme Court, U.S.
FILED
FEB 14 2003

No. 02-1065

In The
Supreme Court of the United States

STEVE MAY,

Petitioner,

v.

JANICE BREWER, as Secretary of State of the State of Arizona, acting in her official capacity; DAVID PETERSON, as Treasurer of the State of Arizona, acting in his official capacity; the CLEAN ELECTIONS COMMISSION; and ARIZONANS FOR CLEAN ELECTIONS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court of Arizona

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

TERRY GODDARD
Attorney General

MARY O'GRADY
Solicitor General

KATHLEEN P. SWEENEY*
TODD F. LANG
Assistant Attorneys General
1275 W. Washington
Phoenix, Arizona 85007-2926
(602) 542-3333
Counsel for the Respondents

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether Arizona's surcharge on civil and criminal fines to fund a public campaign financing system is constitutional because it (1) furthers the compelling governmental interests of encouraging discussion of and participation in the political process and preventing corruption, (2) does not directly burden First Amendment rights, and (3) protects First Amendment interests by allocating funds to qualifying candidates in a viewpoint-neutral manner.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTRODUCTION	1
STATEMENT OF THE CASE	3
Statutory Background	3
Proceedings Below	4
REASONS TO DENY THE PETITION	5
1. The Arizona Supreme Court's Decision Does Not Conflict with Relevant Decisions of This Court	5
a. *Abood* and Its Progeny Are Inapplicable..	6
b. *Southworth* Provides the Appropriate Analysis and the Holding Below Is Clearly Faithful to That Decision	9
c. Petitioner's Attempts to Distinguish *Southworth* Are Unavailing	12
2. There Is No Conflict Among State Courts of Last Resort for This Court to Resolve	14
CONCLUSION	19

TABLE OF AUTHORITIES

Page

CASES

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) ..... *passim*

Board of Regents v. Southworth,
529 U.S. 217 (2000) ..... *passim*

Buckley v. Valeo,
424 U.S. 1 (1976) ..... *passim*

Butterworth v. Republican Party of Florida,
604 So.2d 477 (Fla. 1992) 2, 14, 16, 17

Glickman v. Wileman Bros. & Elliott, Inc.,
521 U.S. 457 (1997) 6, 8

Keller v. State Bar of California,
496 U.S. 1 (1990) ..... *passim*

Lavis v. Bayless, No. CV 2001-006078
(Dec. 19, 2001) 4

Libertarian Party of Indiana v. Packard,
741 F.2d 981 (7th Cir. 1984) 17, 18

May v. Superior Court,
49 P.3d 285 (Ariz. App. 2002) 4

May v. Superior Court,
55 P.3d 768 (Ariz. 2002) 5

United States v. Lee,
455 U.S. 252 (1982) 13

United States v. United Foods, Inc.,
533 U.S. 405 (2001) 1, 5, 6, 7

Vermont Society of Association Executives v. Milne,
779 A.2d 20 (Vt. 2001) 2, 14, 15, 16, 17

TABLE OF AUTHORITIES – Continued

Page

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 11

Wooley v. Maynard, 430 U.S. 705 (1977) 11

STATE STATUTES

A.R.S. § 12-116.01 3

A.R.S. § 16-940 ..... 3, 11

A.R.S. §§ 16-940 through -961 3

A.R.S. § 16-944 4

A.R.S. §§ 16-950 through -951 ..... 7, 14

A.R.S. § 16-954(A) 4

A.R.S. § 16-954(B) 4

A.R.S. § 16-954(C) 3

A.R.S. §§ 16-955 through -956 3

INTRODUCTION

The Arizona Supreme Court upheld a surcharge on civil and criminal fines that funds a public campaign financing system. The State disburses money to qualifying candidates regardless of party or ideological position. In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court recognized that financing political campaigns with public funds does not violate the First Amendment even though the funds might be used to support speech to which some contributors would object. In *Board of Regents v. Southworth*, 529 U.S. 217 (2000), the Court recognized that when the government compels funding for the purpose of facilitating speech that encompasses an entire spectrum of ideas as opposed to speech that has a particular content, allocating the funds in a viewpoint-neutral manner fully protects the First Amendment interests of objectors. Because Arizona's campaign finance system facilitates speech that encompasses the entire spectrum of political ideas and allocates funds in a viewpoint-neutral manner, the Arizona Supreme Court correctly determined that a surcharge that funds this system does not violate the First Amendment.

Petitioner contends that the decision conflicts with this Court's opinions in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). Those cases dealt with associations in which the government could constitutionally mandate membership even though doing so implicated First Amendment rights because compulsory membership furthered important governmental interests. The speech at issue in those cases reflected the particular viewpoints of the associations. The Court has held that members of such associations can be constitutionally required to

provide financial support for the associations' speech if it is "germane" to the purposes that allowed the government to mandate membership. The government cannot, however, condition opportunities to engage in certain employment or receive certain benefits upon a member's financial support of an association's speech with which the person disagrees and which is not germane to the purposes that justified compulsory membership. The Arizona Supreme Court correctly determined that these principles are inapplicable to Arizona's campaign financing system, which does not involve an association or the expression of any particular viewpoint and does not require payment of the surcharge as a condition to obtaining any lawful opportunity or benefit.

Petitioner also contends that the decision cannot be reconciled with the opinions of two other state courts of last resort, *Vermont Society of Association Executives v. Milne*, 779 A.2d 20 (Vt. 2001), and *Butterworth v. Republican Party of Florida*, 604 So.2d 477 (Fla. 1992). These opinions involved public campaign funding assessments that directly targeted speech in the form of lobbying activities and political contributions respectively. The courts struck down these assessments because they directly burdened First Amendment rights and the States could further their interests in publicly funding campaigns by less burdensome means. The Arizona Supreme Court correctly determined that these opinions do not inform the proper disposition of this case because (1) the surcharge does not directly burden any First Amendment rights and (2) Arizona's campaign financing system adequately protects First Amendment concerns by disbursing funds in a viewpoint-neutral manner, thereby attenuating the

connection between the surcharge payers and the messages that particular candidates communicate.

Because the decision comports with this Court's precedents and does not conflict with the cited opinions of other state courts, certiorari is not warranted.

STATEMENT OF THE CASE

Statutory Background

In the 1998 general election, Arizona's voters adopted a citizens' initiative by approving the Citizens Clean Elections Act ("the Act"). *See* A.R.S. §§ 16-940 through -961 (Pet. App. at 39a-76a). Reflecting the public's desire to improve integrity in Arizona government, to diminish the impact of special-interest money, and to encourage citizen participation in the political process, the Act is the most significant campaign finance reform legislation ever adopted in Arizona. *See* A.R.S. § 16-940 (Pet. App. at 39a-40a). It establishes a system of public funding for the election campaigns of candidates who voluntarily agree to limit their fundraising and spending in statewide and state legislative elections. The Citizens Clean Election Commission ("the Commission") implements the Act, promulgates rules, and distributes money to qualifying candidates from a clean elections fund. A.R.S. §§ 16-955 through -956 (Pet. App. at 62a-68a). The majority of the Act's funding comes from the ten percent surcharge that A.R.S. § 16-954(C) (Pet. App. at 60a) imposes on all civil and criminal fines and penalties collected under A.R.S. § 12-116.01. Petitioner, who received a parking ticket subject to the surcharge, challenges this funding source. The Act's other funding sources are: (1) a $5 state income

tax check-off; (2) a dollar-for-dollar income tax credit for fund contributions up to $500 or twenty percent of taxes owed, whichever is greater; and (3) a $100 annual fee imposed on certain classes of lobbyists. A.R.S. §§ 16-944, -954(A), (B) (Pet. App. at 44a, 59a-60a).

Proceedings Below

In 2001, Petitioner and others filed suit in the Maricopa County Superior Court of Arizona challenging the lobbyist fee and the surcharge. The suit alleged that the surcharge constituted compelled political speech in violation of the First Amendment. The trial court granted partial summary judgment to the Defendants based on its finding that the surcharge was constitutional and partial summary judgment to the Plaintiffs based on its finding that the lobbyist fee was not. *Lavis v. Bayless*, minute entry order, No. CV 2001-006078 (Dec. 21, 2001) (Pet. App. at 32a-38a). The trial court distinguished *Abood* and its progeny and relied on *Southworth* in holding that the surcharge was constitutional.

Petitioner filed a special action directly in the Arizona Supreme Court. After the court declined to accept jurisdiction, Petitioner filed a special action in the Arizona Court of Appeals. The Commission did not appeal the trial court's determination that the lobbyist fee was unconstitutional. Thus, the lobbyist fee is not at issue here. On June 17, 2002, the Arizona Court of Appeals ruled that the surcharge was unconstitutional. *May v. Superior Court*, 49 P.3d 285 (Ariz. App. 2002) (Pet. App. at 16a-31a).

The Commission sought review by the Arizona Supreme Court on June 28, 2002. The court unanimously ruled that the surcharge was constitutional on October 11,

2002. *May v. Superior Court*, 55 P.3d 768 (Ariz. 2002) (Pet. App. at 1a-15a). The court relied upon *Buckley* and *Southworth* as supporting its holding.

REASONS TO DENY THE PETITION

1. The Arizona Supreme Court's Decision Does Not Conflict with Relevant Decisions of This Court.

Petitioner concedes, as he must, that public campaign subsidies funded by voluntary check-offs or general appropriations are constitutional under *Buckley*. Pet. at 7-8. In *Buckley*, this Court upheld the Federal Election Campaign Act of 1971, which permitted taxpayers to direct through a voluntary check-off provision on their income tax returns that one dollar of their tax liability be allocated to qualifying presidential candidates from the general fund.[1] 424 U.S. at 85-109. In upholding the Act, the Court determined that the provision did not "abridge, restrict, or censor speech," but rather furthered First Amendment values by "us[ing] public money to facilitate and enlarge discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93. Petitioner incorrectly asserts, however, that such subsidies are unconstitutional under *Abood*, *Keller*, and *United Foods* if they are funded by surcharges on civil and criminal fines. Pet. at 15-16. He maintains that the Arizona Supreme Court erroneously

[1] Although the check-off provision was voluntary, the Court indicated that Congress could constitutionally have funded the campaign finance system with appropriations from the general fund even without a check-off provision. 424 U.S. at 91-92.

relied upon *Southworth*, which he interprets as being wholly limited to the university setting, in ruling that the surcharge at issue here was constitutional. Pet. at 12-13, 16-18. The Arizona Supreme Court correctly determined that *Abood* and its progeny are inapplicable and that the surcharge is constitutional under *Buckley* and *Southworth*. Pet. App. at 10a-11a. No reason exists for this Court to review this holding further.

a. *Abood* and Its Progeny Are Inapplicable.

The government may constitutionally compel private parties to associate and to fund an association's expressive activities when there is a sufficient justification for doing so. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 471-73 (1997). *Abood* and its progeny instruct that the government may not, however, require members of a compelled association to subsidize any of the association's ideological activities that are not germane to those interests that permitted the government to mandate membership in the association in the first place. *United Foods*, 533 U.S. at 413-15; *Keller*, 496 U.S. at 13-14; *Abood*, 431 U.S. at 233-36. The analysis that this Court developed in the *Abood* line of cases simply does not apply to the surcharge here for two reasons.

First, the "germaneness" test that *Abood* and its progeny established applies only to an involuntary association. The surcharge payers are not an association of any kind; they do not pursue a common interest. They have no relationship with one another beyond the fact that they have all paid a civil or criminal fine. They do not have a group identity that links them to the clean elections fund any more than taxpayers whose taxes go into the general

fund. Petitioner, in fact, conceded below in his Petition for Review and at oral argument that there is no association here. *See* Pet. App. at 8a. Consequently, germaneness is a meaningless concept in this case. There is no associational purpose against which to measure the germaneness of the speech in question.

Second, the *Abood* line of cases dealt with speech that had a specific content or viewpoint to which those compelled to contribute objected. *See United Foods*, 533 U.S. at 410 (framing the issue presented as "whether the government may underwrite and sponsor speech *with a certain viewpoint* using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced") (emphasis added); *see also Abood*, 431 U.S. at 232-36; *Keller*, 496 U.S. at 15. Although the contributors disagreed with the message that the organization was disseminating, they were forced to be associated with it. As the Arizona Supreme Court observed, the same is not true with respect to the surcharge payers because "the Clean Elections Act allocates money to all qualifying candidates, regardless of party, position, or message, and thus the surcharge payers are not linked to any specific message, position, or viewpoint." Pet. App. at 8a (citation omitted); *see also* A.R.S. §§ 16-950 through -951 (Pet. App. at 50a-54a). Because the clean election funds are disbursed in a viewpoint-neutral manner, Arizona's law simply does not implicate *Abood*'s principles.

Petitioner erroneously contends that *Abood* was based upon "the fact that the union engaged in political activities beyond those related to the collective bargaining agreement" rather than upon the contributors' objections to particular messages. Pet. at 13. In *Abood*, this Court identified the First Amendment right at issue as the right

to refrain from financially supporting ideological causes that one opposes. 431 U.S. at 234-36 and n.31. The Court did not require the contributors to identify the specific expenditures to which they objected because that (1) would have "confront[ed] an individual employee with the dilemma of relinquishing either his right *to withhold his support of ideological causes to which he object[ed]* or his freedom to maintain his own beliefs without public disclosure" and (2) would have burdened the employee with monitoring the "numerous and shifting expenditures" that the union might make that were unrelated to the associational purpose that justified the compelled contributions. *Id.* at 241 (emphasis added). The Court therefore held that the contributors' allegation that they opposed *any* ideological expenditures that were not germane to the union's collective bargaining purpose was sufficient. *Id.* The First Amendment right being vindicated was nevertheless predicated on the contributors' objections to a specific viewpoint. *See Abood*, 431 U.S. at 236 (holding that the union could only expend funds to advance ideological causes that were not germane to its duties as a collective bargaining representative if it obtained those funds from employees "who do not object to advancing those ideas"); *see also Glickman*, 521 U.S. at 471 (characterizing *Abood* as recognizing "a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's freedom of belief") (internal quotation marks omitted).

For all of the foregoing reasons, the Arizona Supreme Court correctly determined that *Abood* and its progeny are inapposite.

b. *Southworth* Provides the Appropriate Analysis and the Holding Below Is Clearly Faithful to That Decision.

In *Southworth*, a state university allocated a portion of its mandatory student activity fee to a fund that supported various student organizations that were engaged in ideological speech. 529 U.S. at 222-24. In upholding the system, this Court held that the germaneness test that *Abood* and *Keller* developed was "neither applicable nor workable," *id.* at 230, where the university's goal was not to compel funding of speech that had a specific viewpoint but instead was to compel funding of speech "for the sole purpose of facilitating the free and open exchange of ideas," *id.* at 229. The Court observed that in such a situation, "[t]o insist upon asking what speech is germane would be contrary to the very goal that the University seeks to pursue." *Id.* at 232.

The Court recognized that achieving the university's goal of free and open exchange of ideas would inevitably require some students to subsidize speech that they found "objectionable and offensive." *Id.* at 232. Nonetheless, the Court accepted the "important and substantial purposes" that the University was seeking to accomplish by "facilitat[ing] a wide range of speech" in the balance. *Id.* at 231. It decided that the objectors' First Amendment rights would be adequately protected if the government allocated the funds in a viewpoint-neutral fashion. *Id.* at 233 (holding that viewpoint neutrality was "[t]he proper measure" and "the principal standard of protection for objecting students").

The relationship between the surcharge payers and the clean elections fund closely parallels the relationship between the students and the student activity fund in

Southworth. Justice Souter's concurring opinion in *Southworth* distinguished the students' situation there from that of the union members in *Abood* and the bar association members in *Keller* as follows:

> [T]he relationship between the fee payer and the ultimately objectionable expression [in *Southworth*] is far more attenuated. In the union and bar association cases, an individual was required to join or at least drop money in the coffers of the very organization promoting messages subject to objection. The connection between the forced contributor and the ultimate message was as direct as the unmediated contribution to the organization doing the speaking. The student contributor, however, has only to fund a distributing agency having itself no social, political, or ideological character and itself engaging . . . in no expression of any distinct message. Indeed, the disbursements, varying from year to year, are as likely as not to fund an organization that disputes the very message an individual student finds exceptionable. Thus, the clear connection between fee payer and offensive speech that loomed large in our decisions in the union and bar cases is simply not evident here.

Southworth, 529 U.S. at 240 (Souter, J., concurring) (citations omitted). The same distinctions exist here. Like the student activity fee, the surcharge finances a fund that is disbursed in a viewpoint-neutral manner and that does not disseminate any messages itself. There is no greater connection between the surcharge payers and candidates' messages than there is between those messages and any taxpayers in the State of Arizona.

Justice Souter also concluded that the students' objections had "less force than [they] might otherwise carry because the challenged fees support[ed] a government program that aim[ed] to broaden public discourse." *Id.* at 240-41. Of course, *Buckley* suggested that the government could properly use its tax revenues for this purpose. Similarly, Arizona's Clean Elections Act is aimed at broadening public discourse. The voters intended it to "encourage citizen participation in the political process," "promote freedom of speech," and improve communication between candidates and voters. *See* A.R.S. § 16-940 (Pet. App. at 39a-40a).[2]

In sum, the clean elections funding system, like the program in *Southworth*, (1) serves the compelling governmental interests of promoting discussion of and participation in the political process and helping to prevent corruption and (2) protects First Amendment rights by allocating money in a viewpoint-neutral manner, thereby attenuating the connection between the surcharge payers and the messages that particular candidates communicate. The Arizona Supreme Court therefore correctly determined that the clean elections surcharge was constitutional under *Southworth*.

---

[2] Petitioner cites *Wooley v. Maynard*, 430 U.S. 705 (1977), and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). Pet. at 6. In *Wooley*, the government impermissibly compelled speech by requiring the plaintiff to display a license plate bearing a state motto that the plaintiff found offensive. In *Barnette*, the government impermissibly compelled speech by requiring students to salute the flag. There is no comparison between the compelled speech in those cases and the use of a surcharge to fund electoral campaigns on a viewpoint-neutral basis.

c. Petitioner's Attempts to Distinguish *Southworth* Are Unavailing.

Petitioner contends that *Southworth* applies only in the university setting because a university's broad mission is "to discover and disseminate knowledge." Pet. at 17 (internal quotation marks omitted). As the Arizona Supreme Court observed, however, "[w]hile a university is certainly one venue in which the free and open exchange of ideas is encouraged, it is not the only one." Pet. App. 10a. The court correctly determined that *Southworth*'s principles were equally applicable to Arizona's public campaign financing system, which encourages the free and open exchange of ideas in the political arena.

Petitioner's other attempts to distinguish *Southworth* also fail. He notes that association is voluntary in the university setting. Pet. at 17. Attending a university or joining a student group is voluntary. Paying the student activity fee in *Southworth*, which was the basis for the lawsuit, however, was not voluntary.[3] Petitioner argues that the activity fee in *Southworth* was imposed upon all of the students, whereas the clean elections surcharge is

---

[3] Petitioner also observes that the fee could not be used to fund students' partisan political activities or student groups that were primarily politically oriented. Pet. at 17. The First Amendment, however, protects the right to express (or not to express) all beliefs, not just political ones. *Abood*, 431 U.S. at 231. This Court has recognized that "[n]othing in the First Amendment or our cases discussing its meaning makes the question whether the adjective 'political' can properly be attached to those beliefs the critical constitutional inquiry." *Id.* at 232. The student activity fee in *Southworth* would therefore have been just as valid if the university had permitted funding of speech concerning political issues, as long it disbursed the funds in a viewpoint-neutral manner.

imposed only upon a discrete subset of the community. Pet. at 17. The surcharge is not targeted at a discrete group. It applies to all Arizonans. Anyone who has to pay a civil or criminal fine must also pay the surcharge.

Petitioner notes that funding the clean elections system with a surcharge on fines deprives people of the right to decide that they do not wish to contribute to the political process at all. Pet. at 18. This does not render the system unconstitutional. This Court recognized in *Southworth* that the student activity funding system implicated the students' First Amendment rights and would inevitably result in some students being required to subsidize speech that they found to be "objectionable and offensive to their personal beliefs." *Southworth*, 529 U.S. at 231-32. The Court nevertheless determined that the viewpoint-neutrality requirement adequately alleviated any First Amendment concerns. *Id.* at 233-34. Given the similarities between the two systems, the viewpoint-neutrality requirement adequately alleviates any First Amendment concerns with respect to the clean elections funding system as well.

Moreover, this Court noted in *Buckley* that every congressional appropriation "uses public money in a manner to which some taxpayers object." 424 U.S. at 92. The Court has recognized in other cases that government could not function if individual taxpayers could veto appropriations that offended their personal beliefs. *See Southworth,* 529 U.S. at 229; *United States v. Lee*, 455 U.S. 252, 260 (1982). Thus, the fact that a surcharge payer may believe that public funding of elections is not good

public policy does not render the surcharge unconstitutional.[4]

For all of the foregoing reasons, Petitioner's attempts to distinguish *Southworth*'s governing principles fail.

2. There Is No Conflict Among State Courts of Last Resort for This Court to Resolve.

Petitioner asserts that the decisions of other state courts of last resort concerning First Amendment challenges to public campaign financing systems funded by assessments cannot be reconciled with the Arizona Supreme Court's decision in this case. Pet. at 7-12. The cases that Petitioner cites, *Vermont Society of Association Executives v. Milne*, 779 A.2d 20 (Vt. 2001), and *Butterworth v. Republican Party of Florida*, 604 So.2d 477 (Fla. 1992), do not conflict with the Arizona Supreme Court's decision. They simply reach a different result based upon fundamentally different facts that affect the extent to which the assessments at issue burden First Amendment rights. There is no other decision involving the kind of subsidy Arizona has adopted, and thus the issue here is

---

[4] Petitioner also argues that the system is not viewpoint-neutral because only the candidates who are not philosophically opposed to public funding of elections seek to obtain clean elections funding. Pet. at 18. As the Arizona Supreme Court noted, *Southworth*'s viewpoint-neutrality requirement applies to the government's method of allocating funds, not to the viewpoints being subsidized. Pet. App. at 11a. The system distributes clean elections funds to any qualifying candidate regardless of party, ideology, or philosophical opposition to public funding of elections and thus satisfies the requirement. *See* A.R.S. §§ 16-950 through -951 (Pet. App. at 50a-54a).

one of first impression that is inherently unripe for this Court's review.

In *Milne*, the court considered a public campaign fund assessment on expenditures that (1) were made by lobbyists or their employers and (2) were connected with communications or activities aimed at influencing legislation or administrative action. The court recognized the following principles. The First Amendment protects lobbying because it "directly involves core political speech that lies at the very heart of what the First Amendment was designed to safeguard." 779 A.2d at 23-25. The government can regulate First Amendment activity and can impose a fee limited to the cost of doing so. *Id.* at 25. It can also apply generally applicable taxes to First Amendment activities. *Id.* at 25-26. It cannot, however, single out First Amendment activities for special taxation because doing so can abridge First Amendment rights as surely as prohibiting such activities. *Id.*

Because the assessment at issue was "a completely unique type of tax triggered exclusively by core political speech concerning the right to petition one's government," *id.* at 30, the court subjected it to heightened scrutiny, *id.* at 25-31. That is, it required the State to demonstrate that it had a compelling counterbalancing interest that it could not achieve without such differential taxation. *Id.* at 26. Because the assessment at issue did not further any state interest other than raising revenue for the public campaign fund and the State could raise revenue by alternative means, the court invalidated it. *Id.* at 31.

Arizona's surcharge, in contrast, is not imposed upon or triggered by First Amendment activity. It is triggered by having to pay a fine for breaking the law. Moreover, there

is no expressive conduct connected with paying a fine. Consequently, it does not require heightened scrutiny. To the extent that the surcharge implicates First Amendment concerns, the clean elections system ameliorates those concerns by disbursing funds in a viewpoint-neutral manner, thereby attenuating the connection between the surcharge payers and the messages that particular candidates communicate.[5]

Butterworth also involved a public campaign fund assessment that targeted First Amendment rights. The assessment was imposed upon contributions that political parties and committees received. 604 So.2d at 478-79. The court recognized that the First Amendment protects the right to make such contributions because "supporting a political candidate financially is speech and represents political expression at the core of the electoral process." *Id.* at 479. The court noted that the assessment funded political candidates whom the political parties and committees did not support and political causes with which they did not agree. *Id.* at 479-80. The court further noted that the assessment penalized individuals for exercising their rights to contribute to and associate with political parties because it required them to finance persons and

---

[5] Petitioner asserts that the court rejected the defense of "viewpoint neutrality." Pet. at 10. It did not do so in the context in which *Southworth* discussed viewpoint neutrality. It instead rejected the argument that a tax burdening First Amendment interests was unconstitutional only if it suppressed the expression of particular ideas or viewpoints. 779 A.2d at 27-28. This does not conflict with *Southworth*'s holding that where the government compels funding for the purpose of facilitating speech that encompasses an entire spectrum of ideas, allocating the funds in a viewpoint-neutral manner adequately protects the First Amendment rights of objectors. 529 U.S. at 232-33.

causes that they did not support as a price for doing so. *Id.* at 481. The court therefore characterized the assessment as a fee that the government was in effect charging for the privilege of exercising First Amendment rights. *Id.* at 480 n.4. Because the assessment directly burdened First Amendment free speech and associational rights, the court subjected it to heightened scrutiny. *Id.* at 480. The court struck down the assessment because the State had other means of furthering its interest in supporting the public campaign fund that did not infringe on First Amendment rights. *Id.* at 480-81.

Petitioner seriously mischaracterizes *Butterworth* by asserting that the court struck down the assessment because it did not satisfy *Abood*'s germaneness test. Pet. at 9-10. The court did not even mention the germaneness test. Because the assessment directly burdened First Amendment rights, the court scrutinized it to determine whether it served a compelling governmental interest and was narrowly tailored to serve that interest. 604 So.2d at 480.

Because the differences in the outcomes in *Milne* and *Butterworth* on one hand and the present case on the other are appropriately based upon profound differences in the extent to which the assessments at issue burden First Amendment rights, they do not present any conflict between state courts of last resort for this Court to resolve. They certainly do not conflict on the question whether a subsidy paid by recipients of civil and criminal fines can be used to fund electoral campaigns on a viewpoint-neutral basis.

Petitioner also cites *Libertarian Party of Indiana v. Packard*, 741 F.2d 981 (7th Cir. 1984), in an attempt to

demonstrate that there is confusion in this area because he believes that the case may have imposed a voluntariness requirement in addition to a viewpoint-neutrality requirement. Pet. at 12. Petitioner's attempt fails, however, because the court specifically said that voluntariness was not central to its analysis. Moreover, although the decision predates *Southworth*, its reasoning anticipates the reasoning of *Southworth* and the Arizona Supreme Court in this case.[6]

Because there is no conflict among state courts of last resort for this Court to resolve, certiorari is not warranted.

---

[6] Petitioner's assertion that the Seventh Circuit "emphasized" that the tax there involved no compulsion, Pet. at 12, is belied by the court's clear language. The court noted that although Congress had raised the money to fund qualifying political parties in *Buckley* through a voluntary tax check-off provision, this Court had explicitly suggested that Congress could also have appropriated the money from general revenues raised through taxes. 741 F.2d at 989. The court observed that the personalized license plate scheme differed from a general appropriation in that each member of the public could control the amount of money to be distributed to political parties by his or her decision as to whether to buy a license plate. *Id.* at 990. The court then said that this element of control was clearly insufficient to implicate the First Amendment, citing the tax check-off provision in *Buckley*. Thus, the court actually said that voluntariness was *not* significant to its analysis. The court's reasoning therefore is not emblematic of any confusion in this area and is, in fact, consistent with the reasoning of *Southworth* and the Arizona Supreme Court in the present case.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

TERRY GODDARD
Attorney General

MARY O'GRADY
Solicitor General

KATHLEEN P. SWEENEY*
TODD F. LANG
Assistant Attorneys General
1275 W. Washington
Phoenix, Arizona 85007-2926
(602) 542-3333
Counsel of Record
Counsel for the Respondents

Supreme Court, U.S.
FILED
FEB 14 2003

No. 02-1065

IN THE

Supreme Court of the United States

STEVE MAY,

Petitioner,

v.

JANICE BREWER, as Secretary of State of the State of Arizona, acting in her official capacity; DAVID PETERSON, as Treasurer of the State of Arizona, acting in his official capacity; the CLEAN ELECTIONS COMMISSION; and ARIZONANS FOR CLEAN ELECTIONS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF IN OPPOSITION FOR RESPONDENT ARIZONANS FOR CLEAN ELECTIONS

TIMOTHY M. HOGAN
ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST
202 East McDowell Road
Suite 153
Phoenix, AZ 85004
(602) 258-8850

DEBORAH GOLDBERG
Counsel of Record
J.J. GASS
BURT NEUBORNE
FREDERICK A.O. SCHWARZ
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, NY 10013
(212) 998-6730

Counsel for Respondent Arizonans for Clean Elections

QUESTION PRESENTED

May a State, consistent with the First Amendment, designate revenues from a specific tax to fund an otherwise constitutional and viewpoint-neutral public campaign finance system?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Statement of the Case 1

Statutory Background 1

Procedural History 3

Argument 4

I. The Arizona Supreme Court's Decision Creates No Conflict with Decisions of Other State Courts of Last Resort or of Federal Circuit Courts 4

II. When the First Amendment Is Not Implicated, States Have Extensive Authority to Fund Government Programs Through Whatever Taxation System They Choose 6

III. Even If First Amendment Concerns Are Implicated, the Arizona Supreme Court Correctly Applied *Southworth* 9

Conclusion 12

TABLE OF AUTHORITIES

Cases: **Page**

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) 6, 9

Bd. of Regents v. Southworth, 529 U.S. 217 (2000) 9, 10, 11

Buckley v. Valeo, 424 U.S. 1 (1976) 6, 8, 9

Butterworth v. Repub. Party of Fla.,
604 So. 2d 477 (Fla. 1992) 4, 5, 6, 7 n.3

Carmichael v. Southern Coal & Coke Co.,
301 U.S. 495, 521-22 (1937) 7, 8

Dreyer v. Illinois, 187 U.S. 71, 84 (1902) 7

Keller v. State Bar of California, 496 U.S. 1 (1990) 9

Lavis v. Bayless, 233 F. Supp. 2d 1217 (D. Ariz. 2001) ... 3

Libertarian Party of Ind. v. Packard,
741 F.3d 981 (7th Cir. 1984) 6

May v. McNally, 55 P.3d 768 (Ariz. 2002) 2, 5, 6, 7 n.3

Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983) 4

New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) 11

Sweezy v. New Hampshire, 354 U.S. 234 (1957) 7

United States v. United Foods, Inc., 533 U.S. 405 (2001) .. 9

Authorities Cited

Vt. Soc'y of Ass'n Execs. v. Milne,
779 A.2d 20 (Vt. 2001) 5, 6

Statutes and Regulations:

Ariz. Rev. Stat. § 5-839 8

Ariz. Rev. Stat. § 5-840 8

Ariz. Rev. Stat. § 12-116.01 8

Ariz. Rev. Stat. § 12-116.02 8

Ariz. Rev. Stat. § 16-940 1

Ariz. Rev. Stat. § 16-950 ..... 1, 10

Ariz. Rev. Stat. § 16-954 2

Ariz. Rev. Stat. § 36-772 8

Ariz. Rev. Stat. § 36-776 8

28 U.S.C. § 1341 3

Other Authorities:

Arizona State Legislature, John Huppenthal, *at*
http://www.azleg.state.az.us/MembersPage.asp?
Member_ID=59 (last visited Feb. 11, 2002) 10

Authorities Cited

Citizens Clean Elections Commission, General Election – Candidate Listing by Office, *at* http://www.ccec.state.az.us/ccecscr/elections/2002/rptListAllCandGenSubs2002.asp (last visited Feb. 11, 2002) 10

Citizens Clean Elections Commission, 2000 CCEC Fact Sheet, *at* http://www.ccec.state.az.us/ccecscr/elections/2002/ey2000factsheet.asp (last visited Feb. 11, 2002) 2, 3 n.2

Citizens Clean Elections Commission, 2002 Clean Elections Results in Arizona, *at* http://www.ccec.state.az.us/ccecscr/elections/2002/ ey2002factsheet.asp (last visited Feb. 11, 2002) 2, 10

STATEMENT OF THE CASE

At its heart, this case is about the authority of a State to tax non-expressive conduct–a subject on which there is no split of authority. Petitioner concedes that Arizona's "Clean Money/Clean Elections" system of public campaign finance would be constitutional if funded out of general revenues. He contends, however, that the system cannot constitutionally be financed in part from a surcharge on fines and penalties, such as the parking ticket that Petitioner has refused to pay in full.

Petitioner seeks to have this Court gut a constitutional campaign finance system by depriving it of funding. No court outside Arizona has addressed, let alone struck down, a funding mechanism like the one at issue here, so there is no conflict to be resolved by this Court. Nor does this case present any important federal question that this Court's precedents do not fully resolve–consistently with the decision of the Arizona Supreme Court.

Statutory Background

In 1998, the voters of Arizona enacted the Citizens Clean Election Act (the "Act") via ballot initiative. The Act was intended to "create a clean elections system that will improve the integrity of Arizona state government by diminishing the influence of special-interest money, will encourage citizen participation in the political process, and will promote freedom of speech under the U.S. and Arizona Constitutions." Ariz. Rev. Stat. § 16-940. The Act establishes a Citizens Clean Elections Commission, which distributes money to qualifying candidates from a Clean Elections Fund. Candidates must collect a requisite number of five-dollar contributions in order to qualify; no candidates are forced to participate in the Clean Elections system. *See* Ariz. Rev. Stat. § 16-950.

The Act has been well received by both candidates and voters. In 2000, the first election year in which the Clean Elections system was in effect, 59 candidates participated. Citizens Clean Elections Commission, 2000 CCEC Fact Sheet, *at* http://www.ccec.state.az.us/ccecscr/elections/2002/ey2000factsheet.asp (last visited Feb. 11, 2002). In 2002, 139 candidates–more than half of the candidates, including both incumbents and challengers, Democrats and Republicans–participated. Citizens Clean Elections Commission, 2002 Clean Elections Results in Arizona, *at* http://www.ccec.state.az.us/ccecscr/elections/2002/ey2002factsheet.asp (last visited Feb. 11, 2002). A recent opinion poll found that 64 percent of Arizonans believe that the Clean Elections funds have had a positive impact on Arizona elections. *Id.* Although the Act is still young, preliminary evidence indicates that Clean Elections funding has increased competition by increasing the number of contested races.

The Clean Elections Fund receives its funding from three sources: (1) a $5 state income tax check-off; (2) a tax credit for contributions to the Fund up to $500 or 20 percent of taxes owed, whichever is greater; and (3) a 10 percent surcharge on criminal and civil fines. Ariz. Rev. Stat. § 16-954(A)-(C). The 10 percent surcharge, which is the only provision at issue in this case, supplies 68 percent of the Fund's revenue. The Act originally also required lobbyists for for-profit organizations to pay a $100 registration fee, but that provision was invalidated by the trial court, was not appealed, and is no longer part of this case. *See May v. McNally*, 55 P.3d 768, 770 (Ariz. 2002).[1]

---

[1]Petitioner's repeated references to the lobbyist registration fee are a transparent effort to confuse the issues in this case by implying that the provisions that the state courts upheld are similar to the provisions that were invalidated. The lobbyist fee is a distraction: it is no longer in force and was never an important part of the statute. Even when it was in force, the

Procedural History

Petitioner, a member of the Arizona legislature at the time he filed suit, received a parking ticket for $27 in 1999. He refused to pay the less than $3 surcharge required by the Act and filed suit in federal court. The district court concluded, however, that the surcharge was a tax and dismissed the complaint for lack of subject matter jurisdiction under the Tax Injunction Act. *Lavis v. Bayless*, 233 F. Supp. 2d 1217 (D. Ariz. 2001) (citing 28 U.S.C. § 1341).

Petitioner refiled in state court. Petitioner did not challenge the constitutionality of the Act itself, but only two of its sources of revenue: the lobbyist registration fee and the surcharge. As noted earlier, the trial court invalidated the lobbyist registration fee, and that decision was not appealed. Ultimately, the Arizona Supreme Court upheld the surcharge, and Petitioner now seeks review only of that decision.[2]

---

lobbyist registration fee produced less than two percent of the Fund's revenue. Citizens Clean Elections Commission, 2000 CCEC Fact Sheet, *at* http://www.ccec.state.az.us/ccecscr/elections/2002/ey2000factsheet.asp (last visited Feb. 11, 2002).

[2]The state court procedural history is adequately described in the Petition. But Petitioner's suggestion that the State did not defend the case is misleading. Throughout this litigation, the Arizona Attorney General's Office has represented the Citizens Clean Elections Commission in defense of the statute, presenting the State's position to the courts. The decision of two largely nominal officials to leave the defense to the Attorney General says nothing about their views on the merits of Petitioner's claims.

ARGUMENT

I.

THE ARIZONA SUPREME COURT'S DECISION CREATES NO CONFLICT WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT OR OF FEDERAL CIRCUIT COURTS.

Petitioner strains to identify a split among state supreme courts. In reality, the few state courts that have considered constitutional challenges to the means of funding public campaign financing systems have reached consistent outcomes: taxes on speech have been invalidated, and assessments that do not tax or otherwise specially burden speech have been upheld. Taxes that uniquely burden the exercise of First Amendment rights are invalid because of their restraining effect on protected activity. *See, e.g.*, *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 586-88 (1983) (invalidating tax on ink and paper that only applied to large newspapers). Generally applicable assessments, such as Arizona's 10 percent surcharge, do not implicate First Amendment rights and are therefore permitted by the Constitution.

Butterworth v. Republican Party of Florida, 604 So. 2d 477 (Fla. 1992), cited by Petitioner, not only fails to conflict with the decision of the Arizona Supreme Court but is a straightforward application of these principles. To finance Florida's public funding system, the law challenged in *Butterworth* imposed a 1.5 percent assessment on all monetary contributions to political party executive committees and political committees. *Id.* at 479. The Florida Supreme Court acknowledged that publicly funding candidates serves the compelling interests of preserving the integrity of the election process and removing corruption and the appearance of corruption from politics. The court held, however, that

"singling out political parties and associations to support the fund" violated the First Amendment. *Id.* at 480. *Butterworth* thus depended on Florida's decision to tax activities protected by the First Amendment; the Florida court noted that the expenditures could permissibly have been funded by "supporting the fund through general revenues." *Id.*

The only other case in which Petitioner claims to find a conflict with the Arizona Supreme Court's decision actually came to the same result as the Arizona courts on nearly the same facts. In *Vermont Society of Ass'n Executives v. Milne*, the Vermont Supreme Court invalidated a five percent tax on lobbying expenditures over $2,500, just as the Arizona trial court invalidated a $100 fee on lobbyists in this case. 779 A.2d 20 (Vt. 2001). The Vermont court's analysis focused on whether the tax on lobbying was merely an extension of the general sales tax to include lobbying, in which case it would be permissible, or was a tax that singled out First Amendment activity. Concluding that the lobbying tax targeted protected First Amendment activity and was not a general tax, the Vermont court invalidated the tax. Nothing in the Vermont decision even remotely conflicts with the decision below; indeed, as noted, the trial court invalidated Arizona's $100 fee on lobbyists, and Respondents did not appeal that decision.

The funding mechanism challenged here differs fundamentally from the systems at issue in *Butterworth* and *Milne*. Whereas both of those cases dealt with taxes on First Amendment activity, Arizona's decision to increase civil and criminal fines does not implicate the First Amendment. As the Arizona Supreme Court noted, "The opportunity to commit a crime or park illegally is not deserving of the same protection as is the opportunity to participate in lawful activity. . . ." *May*, 55 P.3d at 771.

Petitioner does not even pretend to find a conflict between *May* and federal circuit court opinions. He argues that *Libertarian Party of Indiana v. Packard*, 741 F.3d 981 (7th Cir. 1984), which upheld a general fee to promote political speech through viewpoint-neutral grants, conflicts with *Butterworth* and *Milne*, but does not claim that *Packard* conflicts with *May*. Of course, for the same reason that *May* does not conflict with *Butterworth* and *Milne*, *Packard* does not either: *Butterworth* and *Milne* invalidated taxes on speech, whereas *Packard* and *May* upheld general assessments that did not burden speech. The different outcomes with respect to the constitutionality of the taxes in the two sets of cases simply represent the application of clear law to different fact patterns and do not create a split. In any event, even if *Packard* did conflict with *Butterworth* or *Milne*, that would not support granting certiorari in this case, the decision in which is fully consistent with all three cases.

II.

WHEN THE FIRST AMENDMENT IS NOT IMPLICATED, STATES HAVE EXTENSIVE AUTHORITY TO FUND GOVERNMENT PROGRAMS THROUGH WHATEVER TAXATION SYSTEM THEY CHOOSE.

Except for taxes on speech, the funding mechanisms for public financing systems do not implicate the First Amendment. This Court's decision in *Buckley v. Valeo* establishes that the use of general tax revenues to provide public funding for campaigns does not violate the First Amendment rights of taxpayers. 424 U.S. 1, 91-92 (1976) (per curiam). Notwithstanding Petitioner's claim to the contrary, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) (holding that teachers could not be required to fund teachers' union speech with which they disagreed), does not control this case. *Abood*

and its progeny address when individuals who are required to join an association may be forced to pay for speech with which they disagree. In the case Petitioner now seeks to bring before this Court, he was not required to join any association. He was merely required to pay a tax used for a State program that he does not support. At bottom, this case may raise questions about the State's tax policy, but it does not implicate the First Amendment.[3]

Because the First Amendment is not implicated here, deference to the State's discretion in setting its own tax policy mandates denial of a writ of certiorari in this case. The States retain extensive flexibility to structure their government operations as they see fit. They are not, for example, bound by the federal requirement of separation of powers. *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957); *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902). States' autonomy over taxation systems is similarly broad, providing the States with ample authority to tax one group and use the funds to benefit a different group. *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-22 (1937). As this Court stated in *Carmichael*:

> [I]f the tax, *qua* tax, be good, as we hold it is, and the purpose specified be one which would sustain a subsequent and separate appropriation made out of the general funds of the Treasury, neither is made invalid

---

[3]While the *Butterworth* court applied *Abood*, it did so in the context of considering the First Amendment impact of conditioning political association on contributing money to candidates that the association does not support. *Butterworth*, 604 So. 2d at 479. This case implicates no such issues, as the Arizona Supreme Court noted when it distinguished *Butterworth*. *May*, 55 P.3d at 773 n.5. Unlike the statute at issue in *Butterworth*, the Act does not put any restrictions on association or other First Amendment activities.

> by being bound to the other in the same act of legislation.

Id.

In practice, States routinely fund specific expenditures with dedicated revenue streams from specific taxes. *See, e.g.*, *Carmichael*, 301 U.S. at 522 n.14 (listing representative examples of specific taxes earmarked for specific expenditures). In addition to financing the Clean Elections Fund, surcharges on fines support emergency medical services and criminal justice programs. Ariz. Rev. Stat. §§ 12-116.01, 12-116.02. The Arizona Tourism and Sports Authority's construction of a new football stadium is financed with surcharges on rental cars and hotel rooms. Ariz. Rev. Stat. §§ 5-839, 5-840. Arizona also funds emergency medical services such as trauma centers with taxes on tobacco, even though trauma usually has nothing to do with the use of tobacco. Ariz. Rev. Stat. § 36-776. Indeed, tobacco taxes fund speech designed to reduce smoking in Arizona. Ariz. Rev. Stat. § 36-772. That some smokers may object to state-financed public education programs attacking their behavior is no more and no less significant than the fact that Petitioner objects to the use of the surcharge on his parking ticket to fund an otherwise constitutional public financing system. As this Court noted in *Buckley*: "The fallacy of [this] argument is apparent: every appropriation . . . uses public money in a manner to which some taxpayers object." *Buckley*, 424 U.S. at 91-92.

Petitioner acknowledges that if Arizona financed the Clean Elections Fund with a general appropriation, it would be constitutional under *Buckley*. (Petition at 7-8.) Under *Buckley* and *Carmichael*, Arizona's decision to fund the system from generally applicable surcharges taxing activities not protected by the First Amendment cannot change that result.

III.

EVEN IF FIRST AMENDMENT CONCERNS ARE IMPLICATED, THE ARIZONA SUPREME COURT CORRECTLY APPLIED *SOUTHWORTH*.

The Arizona Supreme Court correctly determined that any First Amendment issues presented by this case are resolved by applying *Board of Regents v. Southworth*, 529 U.S. 217 (2000). *Southworth* is the only case decided by this Court that addresses viewpoint-neutral programs that encourage speech by creating a limited public forum. Unlike *Southworth*, *Abood* and its progeny (including *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *United States v. United Foods, Inc.*, 533 U.S. 405 (2001)), address compelled funding of speech with a single viewpoint. The *Abood* line of cases protects individuals who are compelled to join associations from being forced to support speech with which they disagree. Because the Act does not compel anyone to join any association, and is a viewpoint-neutral effort to promote speech, the Arizona Supreme Court correctly applied *Southworth* in upholding the tax challenged here.

Southworth upheld a system that compelled financing of speech, where the compelled financing served "important and substantial purposes," such as facilitating a wide range of speech in a university setting, and was applied in a viewpoint-neutral way. 529 U.S. at 231, 233-34. Eliminating corruption and the appearance of corruption from political campaigns through public financing are compelling state interests. *See Buckley*, 424 U.S. at 96. Just as *Southworth* serves the important First Amendment value of promoting free and robust speech on a university campus, the Act serves First Amendment interests by using public money to facilitate political speech by a wide range of candidates, including those without wealth, and

by encouraging candidates to run against well-funded incumbents, thus provoking political debate. Consequently, "[t]he proper measure, and the principal standard of protection . . . is the requirement of viewpoint-neutrality in the allocation of funding." *Southworth*, 529 U.S. at 233.

The Citizens Clean Elections Act operates in a manifestly viewpoint-neutral way. Any candidate who receives the requisite number of $5 contributions is entitled to participate in the Clean Elections system, regardless of the candidate's viewpoint, ideology, or party affiliation. Ariz. Rev. Stat. § 16-950. Both Democrats and Republicans have run as Clean Elections candidates; of the 39 participating candidates elected in 2002, 22 were Republicans, and 17 were Democrats. Citizens Clean Elections Commission, 2002 Clean Elections Results in Arizona, *at* http://www.ccec.state.az.us/ccecscr/elections/2002/ey2002factsheet.asp (last visited Feb. 11, 2002).

Petitioner incorrectly contends that the system discriminates against the viewpoint of candidates who oppose public financing. To the contrary, not only may such candidates opt out of the system, but they may also accept Clean Elections Fund money to express precisely that viewpoint: a participating candidate could run on a platform dedicated to dismantling the Clean Elections system. Indeed, Representative John Huppenthal accepted public financing and has sponsored legislation to dismantle the Clean Elections system. *See* Citizens Clean Elections Commission, General Election – Candidate Listing by Office, *at* http://www.ccec.state.az.us/ccecscr/elections/2002/rptListAllCandGenSubs2002.asp (last visited Feb. 11, 2002) (listing Huppenthal as a Clean Elections candidate); Arizona State Legislature, John Huppenthal, *at* http://www.azleg.state.az.us/MembersPage.asp?Member_ID=59 (last visited Feb. 11, 2002) (listing Huppenthal's sponsorship of H.C.R. 2005, which would repeal

the Citizens Clean Elections Act). Viewpoint-neutrality means that all qualifying candidates, regardless of viewpoint, may avail themselves of Clean Election funding. The refusal of some candidates to accept the funds does not render the program viewpoint-based.

Even if this Court eventually decides to provide more guidance on the scope of *Southworth*, this case is not a good vehicle for doing so. *Southworth* is a recent precedent, decided less than three years ago, and the Arizona Supreme Court simply applied its holding to new facts. While an increasing number of States are considering full public financing systems, the number that have implemented such programs is still quite small, and the lower courts have had little opportunity to consider the constitutional implications of these systems and their funding mechanims. If further consideration by this Court is necessary, it will be more fruitful after the issues have had full opportunity to percolate through the State and lower federal courts. This Court can then address any genuine conflicts that may arise, rather than the illusory conflict suggested by Petitioner. In the meantime, the States should be allowed to fill their traditional roles as laboratories of democracy in setting both tax and campaign finance policy. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny the writ of certiorari.

Dated: February 14, 2003

Respectfully submitted,

Deborah Goldberg, *Counsel of Record*
J.J. Gass
Burt Neuborne
Frederick A.O. Schwarz
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, NY 10013
212-998-6730

Timothy M. Hogan
ARIZONA CENTER FOR LAW IN THE
PUBLIC INTEREST
202 East McDowell Road
Suite 153
Phoenix, AZ 85004
602-258-8850

Counsel for Intervenor-Respondent
Arizonans for Clean Elections

(4)

Supreme Court, U.S.
FILED
FEB 25 2003
OFFICE OF THE CLERK

No. 02-1065

In The

Supreme Court of the United States

STEVE MAY,

Petitioner,

v.

JANICE BREWER, as Secretary of State of the State of Arizona, acting in her official capacity; DAVID PETERSON, as Treasurer of the State of Arizona, acting in his official capacity; the CLEAN ELECTIONS COMMISSION; and ARIZONANS FOR CLEAN ELECTIONS,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Arizona

REPLY BRIEF FOR PETITIONER

INSTITUTE FOR JUSTICE
ARIZONA CHAPTER
CLINT BOLICK*
TIMOTHY D. KELLER
111 W. Monroe Street
Suite 1107
Phoenix, AZ 85022
(602) 324-5440

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
SCOTT G. BULLOCK
1717 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006
(202) 955-1300

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

6 pp

ARGUMENT

Respondents' arguments go mainly to the legal dispute at issue in this case. As directed by this Court's rules, we will not re-argue the substance of our case. It is quite clear that petitioners and respondents have a different view of the applicable law, which has produced precisely the type of crisply delineated constitutional question that this Court is best equipped to resolve.

Respondents do not dispute that the case raises important constitutional or public policy issues relating to the growing propensity of states to subsidize political campaigns, either through general appropriations or, as here, special exactions. As we noted in our Petition (Pet. at 19), at least five other states already have done so. Those programs already have produced no fewer than five lawsuits, four of which raised First Amendment claims, two of which led to the invalidation of campaign subsidies and two of which upheld them. The conflict and confusion over the First Amendment issues reflects in the fact that the two appellate courts below, each in a unanimous decision, reached opposite conclusions as the result of applying this Court's different compelled speech frameworks in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) and its progeny on the one hand, and *Bd. of Regents v. Southworth*, 529 U.S. 217 (2000), on the other. Moreover, recently enacted federal campaign finance reform legislation calls for a study of campaign subsidy schemes in Arizona and elsewhere (Pet. at 20). Plainly the issues raised in this case are of nationwide importance; and just as plainly the proper time is now to resolve the conflicting legal approaches taken by lower courts.

Respondents err in their characterization of the main conflicting precedent, *State of Fla. by Butterworth v. Republican Party of Fla.*, 604 So.2d 477 (Fla. 1992), which struck down a campaign subsidy program financed by discrete groups of individuals. Respondents contend that the Florida Supreme Court's decision was grounded in the fact that the subsidies were exacted from political organizations. Although the court discussed that issue in passing, it did not base its holding on that factor, but rather on the fact that the connection between the subsidy and the individuals singled out to pay it flunked the germaneness inquiry that the Arizona Supreme Court rejected in this case. Indeed, the fact that the exactions were imposed on political parties could cut in the opposite direction, because such exactions at least arguably would be germane to political campaigns,[1] in contrast to exactions imposed upon people who incur civil or criminal fines. Ultimately, the Florida Supreme Court concluded that "the assessments impermissibly infringe on their First Amendment rights *by devoting the assessed funds to causes or candidates they do not support. . . .* " *Id.* at 479 (emphasis added). Applying *Abood* (in contrast to the Arizona Supreme Court below, which applied *Southworth*), the Florida Supreme Court reasoned as follows:

> Support from the trust fund is available on a content-neutral basis, but at least a portion of that money will be given to the appellees' adversaries, and in those cases the effect of the assessment will be to subsidize candidates with

[1] Some of the publicly funded campaign finance programs, for instance, derive income from candidate filing fees.

> political positions differing from those of the appellees. Although the infringement upon appellees' rights is not as substantial as it would be if the funds were allocated solely for partisan political purposes with which the appellees disagreed, even laws "restricting freedom of expression only incidentally . . . must be narrowly drawn to avoid unnecessary intrusion on freedom of expression."

Id. at 479-480 (citation omitted). The decision plainly applied the *Abood* germaneness test, and went beyond the *Southworth* inquiry of content neutrality that formed the basis for the Court's decision here. "While publicly funding candidates advances the interest put forth by the State and does not abridge First Amendment values" (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)), "singling out political parties and associations to support the fund *bears no relationship to the interest advanced.*" *Id.* At 480.

Unlike *Buckley*, but like the case in *Butterworth*, here the costs of campaign subsidies are not voluntarily assumed or spread across the general population, but instead imposed upon a discrete group of individuals – precisely the circumstances, as the Florida Supreme Court found in *Butterworth*, that trigger this Court's strict scrutiny of compelled speech. Here, petitioner Steve May was singled out because he incurred a parking fine, not because he had some special relationship with the political system. As in *Butterworth*, inevitably some of the funds would flow to candidates with whom he disagrees – indeed, and perversely, including his own election opponents. For someone like May, in fact, who opposes involuntary or taxpayer-financed campaign subsidies altogether, *all* of the funds would flow to candidates with whom he disagreed.

Butterworth stands in irreconcilable conflict to the decision below. Even though the contours of the subsidies are different – as they would be in any two campaign subsidy schemes – the rule of law announced by the two decisions is starkly contradictory. *Butterworth*, as opposed to the decision below, rejects the notion that *Buckley* dictates the outcome in a case involving involuntary political subsidies as opposed to voluntary funds or funds derived from the entire tax base. Even more significant, *Butterworth* applies the *Abood* germaneness test while the court below rejects it. Either one test or the other applies in the context of involuntary campaign subsidies extracted from discrete groups, and the choice of test virtually dictates the outcome. Only this Court can resolve that conflict.

Respondents separate their position from *Butterworth* in one other vitally important way. Taking a remarkably extreme position – yet a necessary implication of their broader argument – the Arizonans for Clean Elections respondents (Opp. at 7) contend that involuntary political contributions do "not implicate the First Amendment" at all. See also Brewer Opp. at 16 (such contributions entail "no expressive conduct"). In contrast, the Florida Supreme Court opined that "supporting a political candidate financially is speech and represents political expression at the core of the electoral process." *Id.* at 479.

Were this Court to adopt respondents' view, it would mark a tremendous retrenchment of First Amendment principles. Indeed this Court recognized in *Buckley*, 424 U.S. at 14, that political contributions "operate in an area of the most fundamental First Amendment activities." "Certainly, the use of funds to support a political candidate is 'speech'." *Austin v. Mich. State Chamber of Commerce*,

494 U.S. 652, 656 (1991); accord, *Beaumont v. FEC*, 137 F. Supp.2d 648, 651 (E.D.N.C. 2000), *aff'd*, 278 F.3d 261 (4th Cir. 2002) ("the importance of campaign contributions and expenditures as political speech is beyond question"). And yet the Arizona Supreme Court decision embodies the cavalier disregard for First Amendment principles voiced by the respondents.

This case raises urgent issues of public importance. It magnifies a split in authority on important and difficult First Amendment questions. It does so in a manner hospitable to clear resolution by this Court. We respectfully urge this honorable Court to settle the conflict and reaffirm vital First Amendment protections.

Respectfully submitted,

INSTITUTE FOR JUSTICE
ARIZONA CHAPTER
CLINT BOLICK*
TIMOTHY D. KELLER
111 W. Monroe Street
Suite 1107
Phoenix, AZ 85022
(602) 324-5440
**Counsel of Record*

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
SCOTT G. BULLOCK
1717 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006
(202) 955-1300